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No. (1)

IN THE

Supreme Court of the United States

WALTER S. STEVENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the exercise of court-martial jurisdiction over one of more than 93,000 disabled military retirees who do not receive military retired pay and have minimal, if any, contacts with the military exceeds Congress's authority under Article I, § 8, clause 14 to subject members of the "land and naval Forces" to a military justice system that does not comply with certain constitutional requirements, including the right to trial by jury?

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PETITION FOR A WRIT OF CERTIORARI

Walter S. Stevenson, a disabled retiree of the United States Navy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Armed Forces.

OPINIONS BELOW

The opinion of the Court of Appeals for the Armed Forces (CAAF) is published at 66 M.J. 15 and reprinted in the Appendix at 1a-14a. The opinion of the United States Navy-Marine Corps Court of Criminal Appeals (NMCCA) is published at 65 M.J. 639 and reprinted at 15a-42a. The military judge's unpublished order on court-martial jurisdiction is reprinted at 43a-48a. The unpublished orders of the NMCCA and CAAF, which denied Petitioner's interlocutory appeal on jurisdiction, are reprinted at 49a and 51a, respectively.[1]

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1259(3), which permits review of "cases in which the Court of Appeals for the Armed Forces granted a petition for review." The CAAF granted review of Petitioner's petition for review on May 30, 2007, and issued a decision on February 14, 2008.

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[1] Additionally, the NMCCA and CAAF, issued published opinions after an interlocutory appeal of a Fourth Amendment issue. These decisions are published at 52 M.J. 504 and 53 M.J. 257, respectively. Since these decisions are not relevant to the petition, they are not included in the appendix.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, § 8, clause 14 of the United States Constitution vests with Congress the authority "To make Rules for the Government and Regulation of the land and naval Forces."

Article 2(a)(4) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802(a)(4), permits the exercise of court-martial jurisdiction over "Retired members of a regular component of the armed forces who are entitled to pay."

STATEMENT OF THE CASE

This case presents one of the most significant issues of court-martial jurisdiction since Congress enacted the UCMJ in 1950. The lower court's decision unlawfully subjects more than 93,000 disabled military retirees to court-martial jurisdiction, even though they do not receive military retired pay and have minimal, if any, contacts with the military. The court's decision is contrary to the plain language of Article 2(a)(4), UCMJ, and violates Article I, § 8, clause 14 of the Constitution, when that clause is read in conjunction with the Necessary and Proper Clause. The harm caused by this decision increases daily as servicemembers are wounded and disabled in Iraq and Afghanistan. This Court's review is necessary to ensure that disabled servicemembers are not subject to a lifetime of court-martial jurisdiction solely because they were disabled while serving their Country.

A. Facts

Petitioner was an active duty sailor in the United States Navy in 1994, when a Physical Evaluation Board (PEB) diagnosed him with schizophreniform and diabetes. App. 20a, 44a. The PEB awarded him a 30 percent disability rating, which allowed him to receive approximately $600.00 of military retired pay per month. *Id.* at 44a. The PEB also recommended that Petitioner be transferred to the Temporary Disability Retired List (TDRL).[2] On July 15, 1994, the Navy acted on this recommendation, honorably discharged Petitioner from the Navy, and transferred him to the TDRL. *Id.*

During this same time period, Petitioner exercised his right to apply for disability compensation from the Department of Veteran's Affairs (VA). *Id.* at 20a, 44a. A VA medical board evaluated Petitioner and determined that he was 100 percent disabled under the rating guidelines. This meant that Petitioner was eligible to receive VA compensation in amount equal to 100 percent of his Navy base pay or $1,774.00 per

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[2] The TDRL is a list maintained by each service for disabled members whose disabilities are not yet determined to be permanent or stable. 10 U.S.C. § 1202. They are eligible to receive retired pay and medical benefits like permanently disabled retirees. *Id.* However, they must undergo physical examinations every 18 months to ensure the continued existence of their disability. *Id.* § 1210(a). If the disability subsides within five years, the member will either be discharged or, if he consents and is otherwise qualified, returned to active duty. *Id.* §§ 1210(e), 1211. If the disability continues for more than five years, the member will be transferred to the permanent disability retirement list. *Id.* § 1210(c).

month. *Id.* at 20a, 44a-45a. To receive such compensation, federal law required Petitioner to waive his right to military retired pay. *See* 38 U.S.C. § 5305. Petitioner waived his right to military retired pay on December 23, 2004, when VA personnel executed VA Form 21-651a, "Notice of Election of Compensation in lieu of Retired Pay or Waiver of Retired Pay to Secure Compensation from the Veterans Administration." App. 44a. The Defense Finance and Accounting Service (DFAS) accepted this waiver and "discontinued [Petitioner's military retired pay] in its full amount," effective November 1, 1994. *Id.* at 20a, 44a-45a.

As a result of the waiver, "1994 is the last year that Mr. Stevenson receives any pay or remuneration of any sort from the United States Navy or any other branch of the armed forces."[3] *Id.* at 44a. It also is the last year in which Petitioner "render[s] any military service, perform[s] any military duty, or receive[s] any military pay."[4] *Id.* at 46a. Petitioner instead received VA compensation and benefits for his disability.

Petitioner's relationship with the Navy changed in

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[3] After Petitioner's court-martial, the VA terminated his disability compensation and refused to reinstate his benefits after his release from confinement. As a result, the Navy determined that it had an obligation to provide him with retired pay until he resolves the issue with the VA. He is working with VA personnel to reinstate his disability pay.

[4] Petitioner even failed to report to mandatory TDRL physicals. *See* 10 U.S.C. § 1210(a). As a result of this failure, the Chief of Naval Personnel sent Petitioner a form letter on July 29, 1996, stating that his military retired pay would be discontinued. Petitioner did not respond to the letter given his receipt of VA compensation.

1997 when a special agent for the Naval Criminal Investigative Service (NCIS) targeted him for a cold case rape that occurred while he was on active duty in 1992. *Id.* at 20a-21a. Although NCIS agents admittedly lacked probable cause to believe that Petitioner was the perpetrator, they convinced a VA hospital in Memphis, Tennessee to seize an extra vial of Petitioner's blood during a routine, weekly diabetes blood test. *Id.* NCIS wanted to include or exclude Petitioner as a possible suspect by comparing his DNA to the DNA of the alleged attacker.[5]

As a result of this analysis, the Secretary of the Navy authorized the apprehension, pretrial restraint, and court-martial of Petitioner. *Id.* at 21a, 45a. On December 17, 1997, NCIS arrested Petitioner and placed him in pre-trial confinement at Pensacola Naval Air Station. *Id.* at 46a. The Chief of Navy Personnel subsequently referred a single charge of rape against him. *Id.* Block 7 of the Charge Sheet indicated that Petitioner was not entitled to military pay. *Id.*

On July 15, 1999, the Navy determined that Petitioner's disability was permanent in nature. Thus, he was transferred from the TDRL to the Navy's permanent retired list, as set forth in 10 U.S.C. § 1201.

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[5] The CAAF recently held that the search and seizure violated the Fourth Amendment. App. 9a-11a. However, the court remanded the case to the NMCCA to determine whether a search warrant, which was obtained after the illegal search and seizure, was tainted by the illegal intrusion and whether there was an independent basis to justify the search. *Id.* at 11a-12a.

B. Proceedings Below

Prior to his court-martial, Petitioner filed various motions, including one challenging the court-martial's jurisdiction. Petitioner asserted that he was not subject to court-martial jurisdiction because he was not entitled to receive pay, as required by Article 2(a)(4), UCMJ. Petitioner emphasized that he waived his right to military retired pay in 1994 to receive VA compensation. Petitioner also argued that the application of court-martial jurisdiction exceeded Congress's authority under Article I, § 8, clause 14 of the Constitution, when that clause is read in conjunction with the Necessary and Proper Clause, because Petitioner was not part of "the land and naval Forces."

The military judge acknowledged that Petitioner had not received "any pay or remuneration of any sort" from the military between his discharge in 1994 and his court-martial in 1998. App. 44a, 46a. However, the judge upheld jurisdiction because Petitioner could, at some point in the future, waive his right to VA compensation and revert back to military retired pay. *Id.* at 47a. The judge viewed the VA waiver as a mere "bookkeeping maneuver designed to secure the greatest possible retirement benefit for the military retiree and to prevent double payment of retirement benefits." *Id.* The judge did not address the constitutional challenge to court-martial jurisdiction.

After an unsuccessful interlocutory appeal, *see* App. 49a-51a, Petitioner was tried by a general court-martial in October, 2001. A panel of military officers and senior non-commissioned officers found

him guilty of rape and sentenced him to three years' confinement and a dishonorable discharge. *Id.* at 16a. The admiral who convened the court-martial approved the sentence as adjudged. *Id.*

Petitioner appealed his conviction to the NMCCA, a court consisting of senior uniformed Navy and Marine Corps lawyers. He challenged: (i) the court-martial's jurisdiction; (ii) the search and seizure of his blood; (iii) the chain of custody for DNA testing; (iv) the factual and legal sufficiency of the findings; and (v) the excessive delay in processing his case for appellate review. *Id.* at 17a-18a & n.4. The court generally rejected Petitioner's arguments on July 24, 2006.[6] Like the military judge, the court upheld jurisdiction because a disabled retiree had "the option of renouncing the VA disability compensation and returning to his or her prior entitlement to military disability retired pay." *Id.* at 24a. Thus, the court held that Petitioner was still entitled to pay under Article 2(a)(4). *Id.* at 24a-25a. Again, the court did not address Petitioner's constitutional challenge.

The CAAF granted Petitioner's petition for review on May 30, 2007, although it failed to grant his claim regarding court-martial jurisdiction. Petitioner filed a request for reconsideration, arguing that the CAAF should grant review of the jurisdictional issue because it is an issue of first impression with impact on more than 93,000 disabled retirees. The court

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[6] The court granted some relief for the excessive delay in preparing Petitioner's case for appellate review. App. 38a-42a. Specifically, it upgraded his dishonorable discharge to a bad-conduct discharge. *Id.* at 42a.

denied the request.

The CAAF issued its opinion on February 14, 2008, and determined that NCIS agents violated Petitioner's Fourth Amendment rights by searching and seizing his blood at the VA hospital. However, the court remanded the case to the NMCCA to determine whether a subsequent search warrant was tainted by the illegal search and seizure. This issue is pending review at the lower court.

REASONS FOR GRANTING THE PETITION

This case presents another example where a military court has unlawfully subjected a civilian ex-servicemember to court-martial jurisdictional. *See Toth v. Quarles*, 350 U.S. 11 (1955). In this case, the lower court interpreted Article 2(a)(4), UCMJ, so that all military retirees—even those who do not receive military retired pay and have few, if any, contacts with the military—are subject to court-martial jurisdiction. This interpretation results in Article 2(a)(4) exceeding Congress's authority under Article I, § 8, clause 14 of the Constitution, because it subjects civilians like Petitioner to court-martial jurisdiction and deprives them of important constitutional safeguards provided by Article III courts, including the right to trial by jury.

The corrosive impact of the lower court's decision cannot be overstated. According to the Department of Defense (DoD) Office of the Actuary, the DoD had 180,463 disabled retirees on its retirement rolls as of September 30, 2006. *See* "Fiscal Year 2006 DoD Statistical Report on the Military Retirements System," DoD Office of the Actuary, at 158 ("2006

DoD Statistical Report").[7] Of that total, more than half of these disabled servicemembers—93,231—did not receive any pay from military. *Id.* This number will increase as more than 30,000 servicemembers have been wounded in Iraq and Afghanistan, and many more have been diagnosed with post-traumatic stress disorder.[8]

Without action by the Court, all of these disabled veterans could be subject to a lifetime of court-martial jurisdiction simply because they were disabled while serving their Country. These servicemembers already have sacrificed much. They should not be required to sacrifice the rights and constitutional protections guaranteed in criminal trials before Article III courts and state courts.

I. Disabled Military Retirees Are Not Part of the Land and Naval Forces.

It is well settled that civilians are not subject to court-martial jurisdiction. *See Toth*, 350 U.S. at 23; *Reid v. Covert*, 354 U.S. 1, 19 (1957). Under Article I, § 8, clause 14 of the Constitution, when that clause is read in conjunction with the Necessary and Proper Clause,[9] Congress can "make Rules" under clause 14

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[7] *See* http://www.defenselink.mil/actuary/statbook2006.pdf.

[8] *See* http://www.defenselink.mil/news/casualty.pdf; *see also* http://www.defenselink.mil/news/newsarticle.aspx?id=49604 (acknowledging a report that indicates nearly 20 percent of veterans returning from Iraq and Afghanistan are reporting symptoms consistent with post-traumatic stress disorder or major depression).

[9] Article I, section 8, clause 18 of the Constitution provides Congress with the authority "[t]o make all Laws which shall be

only to regulate "the land and naval Forces." *Toth*, 350 U.S. at 15. Thus, "[t]rial by court-martial is constitutionally permissible *only* for persons who can, *on a fair appraisal*, be regarded as falling within the authority given to Congress under Article I to regulate the 'land and naval Forces.'" *Kinsella v. United States*, 361 U.S. 234, 240 (1960) (quoting *Reid*, 354 U.S. at 42 (Frankfurter, J., concurring)) (emphasis in original).

In *Toth*, the Court prohibited the application of court-martial jurisdiction over discharged military members, even if they committed crimes on active duty. 350 U.S. at 20-21, 23. The Court held that the phrase "land and naval Forces" restricted "court-martial jurisdiction to persons who are actually members or part of the armed forces." *Id.* at 15. To permit otherwise, the exercise of court-martial jurisdiction would "encroach[] on the jurisdiction of federal courts set up under Article III of the Constitution where persons on trial are surrounded with more constitutional safeguards than in military tribunals." *Id.*

Similarly, in *Reid v. Covert*, the Court rejected a statute that would allow the military to court-martial civilian dependents. The Court held that "[i]f the language of Clause 14 is given its natural meaning, the power granted does not extend to civilians—even though they may be dependents living with servicemen on a military base." *Reid*, 354 U.S. at 19 (footnotes omitted). "The term 'land

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necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

and naval forces' refers to persons who are members of the armed services and not to their civilian wives, children and other dependents." *Id.* at 19-20.

While this Court has not yet addressed whether disabled retirees are part of the "land and naval Forces," it has indicated that regular military retirees (*i.e.*, those who retire based on age or time in service) can be subject to court-martial jurisdiction. *See McCarty v. McCarty*, 453 U.S. 210, 221-22 (1981) (citing *Hooper v. United States*, 326 F.2d 982 (Ct. Cl.), *cert. denied*, 377 U.S. 977 (1964)). In *Hooper*, the Court of Claims held that while it was a close question, jurisdiction was proper over regular retired officers because their pay was "not solely recompense for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies." *Hooper*, 326 F.2d at 987. In sum, this retainer pay provided Mr. Hooper with "a direct connection" to the "land and naval forces." *Id.*

That "direct connection" does not exist here. As noted above, Petitioner was honorably discharged from the Navy in 1994 because he had schizophreniaform and was "unfit to perform [his] duties." *See* 10 U.S.C. §§ 1201, 1202. Five years later, the Navy again determined that Petitioner was unfit for duty and placed him on the permanent retired list. 10 U.S.C. §§ 1201, 1210. This discharge should have terminated court-martial jurisdiction absent some additional contact or relationship between Petitioner and the military. *Toth*, 350 U.S. at 14-15; *Hooper*, 326 F.2d at 987; *see also United States v. Brown*, 31 C.M.R. 279, 280 (C.M.A. 1962) (once servicemember transferred to the Ready

Reserve, he was not in the "land and naval Force."). Those additional contacts do not exist in this case.

Like the civilian in *Toth*, Petitioner did not receive military retired pay, performed no duties, and received no military medical care.[10] Rather, he received benefits and disability compensation from the VA, a federal agency designed to help former servicemembers transition from military life to civilian life. It strains logic to suggest, on fair appraisal, that Petitioner is part of the "land and naval Forces" when he receives no pay and few benefits from the military.

Moreover, while disabled retirees *could* be recalled to active duty under 10 U.S.C. § 688, such a possibility is too remote and speculative to serve as a basis for court-martial jurisdiction. Under the DoD's current mobilization policy, DoD Directive 1352.1 (July 16, 2005), each Service only screens and maintains a recall list and records for *non-disability* retired regulars who are under the age of 60 (referred to as category I and II retirees).[11] *See id.*, ¶¶ 5.4.3, 5.4.4. As for disabled retirees (category III retirees), like Petitioner, the DoD does not keep data on their physical health or availability for recall.

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[10] Even if Petitioner received the military medical benefits, the receipt of this benefit alone would not be sufficient for court-martial jurisdiction. *Reid*, 354 U.S. at 23 & n.41.

[11] Under DoD Directive 1352.1, ¶ E1.1.3, there are three categories of retirees: (Category I) non-disability retirees that are under the age of 60 and have been retired for less than 5 years; (Category II) non-disability retirees that are under the age of 60 and have been retired for more than 5 years; and (Category III) all other retirees, including disabled retirees and retirees over the age of 60.

They are simply not part of the DoD's recall contingency plans or, for that matter, part of the "land and naval Forces."[12]

Nor is it sufficient to extend court-martial jurisdiction based on the mere possibility of recall to active duty. *Hirshberg v. Cooke*, 336 U.S. 210, 214 (1949) (holding that "illogical and fortuitous contingencies" are rarely, if ever, sufficient for court-martial jurisdiction); *see also Murphy v. Dalton*, 81 F.3d 343, 347 (3d Cir. 1996). To hold otherwise, court-martial jurisdiction could be asserted over a regular reservist prior to being recalled to active duty, a draftee prior to his induction, or a high school student who signs a military contract as part of the delayed entry program. Courts, however, have not extended jurisdiction based on a future affiliation with the armed forces. *See United States v. Spradley*, 41 M.J. 827, 830-31 (N.M.C.C.A. 1995) (holding that "'subject to recall' is not the same as 'subject to the Code'"); *Brown*, 31 C.M.R. at 280 (even though person was transferred to the Ready Reserve, and thus subject to recall, he was not in the "land and naval Force," absent a recall to active duty). It likewise should not be extended in this case.

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[12] It is generally recognized that disabled retirees are recallable in times of national emergency, but only if they are physically capable of providing service. They are normally assisgned jobs held by civilians. *See* 32 C.F.R. § 64.6 (2003), *repealed by* 71 Fed. Reg. 19,827 (2006); *see also Career Compensation Act of 1949: Hearings on H.R. 5007 Before the Comm. on Armed Services*, 81st Cong. 295-97 (statement of Admiral Fechteler, saying that disabled retirees could only in "in time of war or national emergency").

That leaves the question of whether Petitioner's potential receipt of retired pay provides a basis for court-martial jurisdiction. It does not. Unlike regular retirees, as discussed in *Hooper*, disabled retirees do not receive military retired pay as a retainer for future service. *See Hooper*, 326 F.2d at 987; *McCarty*, 453 U.S. at 222. They receive retired pay because they were injured on active duty and are "unfit to perform" future service. 10 U.S.C. §§ 1201, 1202. The pay, in turn, "compensate[s] the disabled veteran for the loss of military pay caused by his premature retirement and for his diminished ability to compete for civilian employment." *In re Marriage of Jones*, 531 P.2d 420, 423 (Cal. 1975) (citing Note, 27 JAG J. 392, 400 (1973)).

Ultimately, as this Court emphasized in *Kinsella*, "military tribunals must be restricted 'to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.'" *Kinsella v. United States*, 361 U.S. at 240 (quoting *Toth*, 350 U.S. at 22). Here, there is no constitutional or historical basis that would justify court-martial jurisdiction over disabled retirees. This is especially true where the disabled retiree is not receiving military retired pay and has little or no contact with the military. These retirees should not be subject to a lifetime of court-martial jurisdiction because they were disabled during military service. They are, like the civilian in *Toth*, no longer part of the "land and naval Forces."

II. Article 2(a)(4) Does Not Permit Court-Martial Jurisdiction Over Disabled Retirees.

The lower court's decision does not comport with the plain meaning of Article 2(a)(4), UCMJ. That statute limits court-martial jurisdiction to: "[1] a retiree of a regular component of the armed force [2] that is entitled to pay." Although the phrase "entitled to pay" is not defined by statute, these words are subject to common sense definitions. The word "entitle" means "to give a legal right or title" and "pay" means "wages, salary or remuneration." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 758, 1659 (1981). In other words, Article 2(a)(4) permits court-martial jurisdiction over military retirees that have a legal right to receive pay from the military.

Petitioner did not have such a right. He lost his entitlement to receive military retired pay in 1994 when he accepted VA compensation in lieu of that pay. The waiver ended the Navy's obligation to pay Petitioner, *see* 38 U.S.C. § 5305, but likewise ended its ability to court-martial him. Petitioner either has the right to receive Navy retired pay, in which case the Navy owes Petitioner a substantial amount of back pay, or it does not owe him retired pay, in which case it does not have the authority to court-martial him. The Navy cannot have it both ways.

Moreover, contrary to the lower court's decision, it does not matter whether Petitioner could waive his VA compensation (approximately $1800.00 per month) and revert back to military retired pay (approximately $600.00 per month). App. 24a-25a.

Even if this was likely (it is not), Petitioner's possible future actions cannot serve as a current basis for court-martial jurisdiction. Such "illogical and fortuitous contingencies" are rarely, if ever, sufficient for court-martial jurisdiction. *Hirshberg*, 336 U.S. at 214; *see also Murphy*, 81 F.3d at 347.

The lower court's decision also fails to comport with Congress's clear intent to limit Article 2(a)(4). By using the words "entitled to pay," Congress necessarily recognized that there are some active duty retirees who are entitled to pay (and subject to court-martial jurisdiction) and some retirees who are not entitled to pay (and not subject to jurisdiction). This is true even though all active duty retirees are statutorily authorized to receive retirement pay by virtue of their retirement. *See* 10 U.S.C. §§ 3991 (Army), 6333 (Navy), and 8991 (Air Force) (2007). The only way a retiree loses that right to receive pay (and, thus, not be subject to court-martial jurisdiction) is when the retiree executes a statutory waiver. *See* DoD Financial Management Regulation, Vol. 7B, Chap. 12, § 1201(A) (2000). There are only two such waivers: when the member accepts VA compensation in lieu of retired pay, *see* 38 U.S.C. § 5305, or when he seeks to increase his civil service retirement, *see* 5 U.S.C. § 8332(c).

By not recognizing these waivers, the lower court necessarily subjects all active duty retirees to court-martial jurisdiction. In this context, the decision makes the "entitled to pay" language unnecessary and superfluous to the "retired members" language. Such an interpretation violates the most basic principles of statutory construction. *See Dole Food Co. v. Patrickson*, 538 U.S. 468, 476-77 (2003); *see*

also United States v. Nordic Village, Inc., 503 U.S. 30, 36 (1992) (statutes must "be construed in such fashion that every word has some operative effect").

The limited nature of Article 2(a)(4) is further evidenced by its legislative history. As noted during the Senate and House hearings, the drafters of the UCMJ found Article 2(a)(4) appropriate because retirees "are receiving pay." *Uniform Code of Military Justice: Hearings on S. 857 and H.R. 4080 Before the Subcomm. of the Comm. on Armed Services*, 81st Cong. 330-31 (statements of Senator Leverett Saltonstall and Felix Larkin, assistant general counsel, Office of the Secretary of Defense). Accordingly, in its original version, Article 2(a)(4) granted jurisdiction over retirees "entitled to receive pay." 10 U.S.C. § 802(a)(4) (1950). Although the word "receive" was deleted in 1956 as unnecessary "surplusage," *see id.* (1956 amendments to subsection (4)), it did not change Congress's intent to restrict jurisdiction to a limited class of retirees who are receiving military retired pay. The lower court's decision to the contrary violates this clear intent.

In sum, neither the plain language of Article 2(a)(4) nor its legislative history supports the lower court's decision. Congress did not intend to subject disabled retirees, like Petitioner, who do not receive military retired pay to court-martial jurisdiction. This Court should grant review to correct this clear error in the interpretation of Article 2(a)(4), UCMJ.

III. The Court Should Not Delay Its Review of this Case

Notwithstanding the lower court's remand, Petitioner's case is ripe for review. This Court has emphasized that a matter is final and ripe for review when "there is nothing more to be decided" by the lower court. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 72 (1946).

Such is the case here. The CAAF's remand in this case relates solely to the question of whether the search warrant, which was issued after the illegal search and seizure of Petitioner's blood, violated the Fourth Amendment. The issue of court-martial jurisdiction, as raised herein, was decided by the court in 2006, *see* App. 22a-25a, and will not be revisited on remand. Thus, the jurisdiction issue is ripe for the Court's review.

Moreover, if this Court fails to grant the petition, it may lose jurisdiction to review Petitioner's jurisdictional claim in the future. As noted above, the Court's jurisdiction, as set forth in 28 U.S.C. § 1259, limits the Court's review to cases in which the CAAF grants discretionary review. If the CAAF fails to grant review of Petitioner's case after the lower court's decision on remand, the Court would lack jurisdiction to review the case. This potential loss of a claim alone makes this case ripe and compels this Court's grant of review. *See Solorio v. United States*, 483 U.S. 435 (1987) (this Court granted review of a military case prior to its review by military appellate courts). Accordingly, Petitioner respectfully requests this Court's review of his jurisdictional claims without further delay.

CONCLUSION

The Petitioner respectfully requests the Court grant this petition for a writ of certiorari.

Respectfully submitted,

M. ERIC EVERSOLE*
Lieutenant Commander, JAGC
U.S. Navy
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Navy-Marine Corps Appellate
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May 2008

Appendix A

UNITED STATES, Appellee,

v.

Walter S. STEVENSON, Hospital Corpsman Third Class
U.S. Navy, Appellant.

No. 06-0934

Crim. App. No. 200301272

United States Court of Appeals for the Armed Forces

Argued October 24, 2007

Decided February 14, 2008

BAKER, J., delivered the opinion of the Court, in which ERDMANN, STUCKY, and RYAN, JJ., joined. EFFRON, C.J., filed a separate opinion concurring in part and in the result.

Counsel

For Appellant: Lieutenant Commander M. Eric Eversole, JAGC, USN (argued); Lieutenant A. M. Cooper, JAGC, USN.

For Appellee: Lieutenant Derek D. Butler, JAGC, USN (argued); Major Brian K. Keller, USMC (on brief); Commander Paul C. LeBlanc, JAGC, USN, and Major Wilbur Lee, USMC.

Amicus Curiae for Appellant: Christopher J. Eckhart (law student) (argued); Joel M. Schumm, Esq. (supervising attorney) (on brief) -- for the Indiana University School of Law, Indianapolis.

Military Judge: Raymond Kreichelt

Judge BAKER delivered the opinion of the Court.

Appellant was tried by a general court-martial convened with members at Naval Station Great Lakes, Illinois. Contrary to his pleas, he was convicted of rape, in violation of Article 120, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 920 (2000). The court members sentenced him to confinement for three years, and a dishonorable discharge. The sentence was approved by the convening authority, and affirmed by the United States Navy-Marine Corps Court of Criminal Appeals. United States v. Stevenson (Stevenson I), 52 M.J. 504, 510 (N-M. Ct. Crim. App. 1999). On Appellant's petition we granted review of the following questions:

I. WHETHER NCIS AND VA HOSPITAL PERSONNEL VIOLATED THE FOURTH AMENDMENT BY SEIZING APPELLANT'S BLOOD AND SEARCHING IT FOR DNA EVIDENCE WITHOUT PROBABLE CAUSE OR A SEARCH WARRANT ISSUED ON PROBABLE CAUSE?

II. IF THIS COURT SUPPRESSES THE EVIDENCE FROM THE WARRANTLESS SEARCH AND SEIZURE, SUPRA, DID THE LOWER COURT ERR BY FAILING TO

ADDRESS OR SUPPRESS BLOOD AND DNA EVIDENCE GAINED BY A SEARCH WARRANT ISSUED ON TAINTED EVIDENCE AND MATERIAL MISREPRESENTATIONS?

Based on the reasoning below, we hold that the actions of the Naval Criminal Investigative Service (NCIS) and the Department of Veterans' Affairs (VA) violated Appellant's Fourth Amendment right against unreasonable search and seizure, and we remand the second issue to the court below for further factual determination.[1]

I.

This case involves several blood draws. In November 1997, NCIS investigators determined that Appellant was a possible suspect in a November 1992 rape of a military dependent in Hawaii, where Appellant had been stationed. At the time of the investigation, Appellant was assigned to the temporary disability retired list (TDRL), and was being treated for diabetes at the VA hospital in Memphis, Tennessee. As part of his treatment, Appellant routinely had his blood drawn by VA medical personnel for the purpose of treatment. Appellant was aware of the purpose of the draws and consented to them.

During the course of their investigation, NCIS agents learned of the treatment that Appellant was receiving from the VA, including the periodic blood

[1] Oral argument in this case was held at the Indiana University School of Law, Indianapolis, as a part of Project Outreach.

draws. As a result, NCIS requested that VA medical personnel draw an additional vial so that law enforcement authorities might have that blood tested to identify Appellant's DNA. This request was vetted by lawyers at the VA, who concluded that the blood could be drawn for and searched by NCIS. As a result, at Appellant's routine, consensual blood draw on June 3, 1998, the VA staff drew an additional vial without informing Appellant of the purpose for doing so. This sample was sent to the United States Criminal Investigations Laboratory and tested to determine the DNA composition of the blood for law enforcement purposes. It is this blood draw that is implicated by the first assigned issue.

At trial, the military judge excluded from evidence the vial of blood drawn and tested without Appellant's permission. NCIS agents then sought and obtained a warrant from a United States federal magistrate in Tennessee, permitting NCIS agents to obtain an additional vial of Appellant's blood. It is this request and warrant that are at the root of Appellant's second assigned issue.

This is the second time this Court has considered Appellant's case. In United States v. Stevenson (Stevenson II), 53 M.J. 257 (C.A.A.F. 2000), we held that Military Rule of Evidence (M.R.E.) 312(f) applied to persons on the TDRL, and remanded the case for further proceedings to determine whether, in light of United States v. Fitten, 42 M.J. 179 (C.M.A. 1995), "the prolonged intrusion of the needle in [Appellant's] arm while a second vial was placed on the vacuum needle, and then for some additional period while the blood was extracted into the vial,

was a de minimis intrusion with respect to the Fourth Amendment and Mil. R. Evid. 312(f)." Stevenson II, 53 M.J. at 260-61.

On remand the military judge found as a matter of fact and law that: (1) Appellant's blood draw was motivated by medical personnel concerned with Appellant's diabetic condition; (2) the blood draw was not directed by law enforcement officials, but rather was part of his medical treatment by the VA; (3) the blood draw was conducted by medical personnel in a VA hospital environment; (4) the NCIS request for a blood sample had no impact on the initial needle intrusion and did not cause any additional intrusion; (5) the NCIS request for a blood sample resulted in a de minimis impact by prolonging the time the needle was in Appellant's arm only by a few seconds; and (6) the initial blood draw was for a valid medical purpose and necessary to preserve the health of a servicemember. The military judge also found that, since the blood was drawn for a valid medical purpose, M.R.E. 312 did not "limit the purposes to which the seized evidence may be put or used." The United States Navy-Marine Corps Court of Criminal Appeals affirmed the military judge's findings of fact and conclusions of law. United States v. Stevenson (Stevenson III), 65 M.J. 639, 645 (N-M Ct. Crim. App. 2006).

"We review the denial of a motion to suppress for an abuse of discretion." United States v. Rader, 65 M.J. 30, 32 (C.A.A.F. 2007) (citing United States v. Khamsouk, 57 M.J. 282, 286 (C.A.A.F. 2002)). Findings of fact are affirmed unless they are clearly erroneous; conclusions of law are reviewed de novo.

United States v. Flores, 64 M.J. 451, 454 (C.A.A.F. 2007) (citing Khamsouk, 57 M.J. at 286).

II.

On appeal, Appellant argues that the Government did not possess a special health care need under M.R.E. 312 sufficient to permit the violation of his Fourth Amendment right through the warrantless seizure and search of his blood for DNA testing. To hold otherwise, Appellant argues, would be to eliminate any distinction between the military's interest in the provision of health care, and a general law enforcement interest. The Government responds that the drawing of Appellant's blood at the VA hospital represented a de minimis intrusion justified by the Government's necessary interest in the health of its servicemembers in order to determine their fitness for duty, and therefore did not violate Appellant's Fourth Amendment rights.

The threshold question is whether Appellant had an expectation of privacy in his blood that required the Government to obtain a warrant prior to seizing and searching that blood for law enforcement purposes. Ordinarily, as the Supreme Court has held, a person has a reasonable expectation of privacy in his blood. See Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 616 (1989). Furthermore, while military service necessitates a reduced expectation of privacy in bodily fluids with respect to drug testing, servicemembers otherwise generally retain their Fourth Amendment right against unreasonable search and seizure. See Murray v. Haldeman, 16 M.J. 74, 81 (C.M.A. 1983);

Committee for GI Rights v. Callaway, 518 F.2d 466, 476 (D.C. Cir. 1975).

Of course, within the context of bodily fluids, there are a number of exceptions to the warrant requirement as well as circumstances that would negate the need for a warrant. These include situations where there exists both probable cause and the need to prevent the loss of evidence, see Schmerber v. California, 384 U.S. 757, 770-71 (1966), where the search is necessary to save someone's life and the evidence is in plain view, see Mincey v. Arizona, 437 U.S. 385, 392-93 (1978), and where the government demonstrates "'special needs, beyond the normal need for law enforcement,'" see Chandler v. Miller, 520 U.S. 305, 313-14 (1997) (citation omitted). In addition, M.R.E. 312(f), rather than being an exception to the warrant requirement, authorizes the admission of evidence that was developed incident to a valid medical purpose.

M.R.E. 312(f) states:

> Nothing in this rule shall be deemed to interfere with the lawful authority of the armed forces to take whatever action may be necessary to preserve the health of a service-member. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Mil. R. Evid. 311.

The specific question raised by this case is whether Appellant had an objectively reasonable

expectation of privacy in his bodily integrity (i.e., DNA), in light of M.R.E. 312(f). But for this Court's application of Fitten in Stevenson II, the answer would be straightforward.

The Drafters' Analysis of the Military Rules of Evidence states that M.R.E. 312(f) was intended to make "it clear that the Armed Forces retain their power to ensure the health of their members." Manual for Courts-Martial, United States, Analysis of the Military Rules of Evidence app. 22 at A22-20 (2005 ed.) [hereinafter Drafters Analysis]. The Drafters' Analysis continues, "[a] procedure conducted for valid medical purposes may yield admissible evidence. Similarly, Rule 312 does not affect in any way any procedure necessary for diagnostic or treatment purposes." Id. Thus, M.R.E. 312(f) permits the admission of evidence discovered during the regular course of medical treatment.

M.R.E. 312(f) is intended to ensure the provision of essential medical care when necessary to preserve the health of servicemembers. The rule permits that evidence found or seized in the course of medical treatment, which is to say, that is incidental to medical treatment, is not subject to suppression. In this way, the rule orients the government to the provision of medical assistance to the servicemember, without consideration of the legal requirements (and potential delays) that might pertain to the law enforcement collection of evidence. However, the rule is not intended to serve as cover and concealment for law enforcement inquiries or as an exception to otherwise applicable Fourth Amendment requirements. Therefore, the rule does

not serve to permit additional searches and seizures that are not incident to treatment. Whether such additional searches are admissible is a question of Fourth Amendment analysis.

Nor is there any indication that either Congress, through delegated authority to the President under Article 36, UCMJ, 10 U.S.C. § 836 (2000), or the President through promulgation of M.R.E. 312 and M.R.E. 313 intended to abolish servicemembers' expectation of privacy in blood drawn in furtherance of military preparedness. To the contrary, 10 U.S.C. § 1565a (2000) (governing the use of DNA collected for casualty identification) reflects considerable concern about the handling of DNA. In this case, for these reasons, M.R.E. 312(f) is not applicable to the second vial of blood drawn at the VA hospital, and does not otherwise obviate Appellant's reasonable expectation of privacy. The ruling of the United States Navy-Marine Corps Court of Criminal Appeals with respect to the exclusion of the vial of blood drawn at the VA hospital is therefore reversed.

In fairness to the military judge, the lower court and the parties, the clarity of this conclusion was not forecast by this Court's discussion of Fitten in Stevenson II. In Fitten, the appellant -- admitted to the emergency room because of erratic behavior apparently due to drug use -- underwent an involuntary catheterization in order to determine the cause of his condition, so as to inform subsequent treatment. 42 M.J. at 180. The appellant's command requested that, during the procedure, an additional sample of the urine be collected, and given to the command. Id. This Court upheld the

admission of the urine test under M.R.E. 312, finding among other things that the catheterization caused only a de minimis intrusion, which did not "shock the conscience." Id. at 182. The de minimis nature of the search was one of a totality of circumstances relied on by the Court. Id. However, in Stevenson II the de minimis nature of the search was referenced as the conclusion of the Court. 53 M.J. at 260. In turn, the Court of Criminal Appeals on remand referred to this conclusion as the holding in Fitten. Stevenson II, 65 M.J. at 644-45.

However, while the degree of an intrusion may inform whether an objectively reasonable expectation of privacy exists, the Supreme Court has not adopted a de minimis exception to the Fourth Amendment's warrant requirement. To the contrary, the Supreme Court has held that the need for a warrant is not relieved by the use of advanced search methods that are imperceptible to the subject of the search. See, e.g., Kyllo v. United States, 533 U.S. 27, 34, 40 (2001) (the use of infrared cameras to determine the heat of a house where federal agents suspected marijuana was being grown). Thus, to the extent that Fitten and Stevenson II stand for the proposition that there is a de minimis exception to the Fourth Amendment or to M.R.E. 312, they are overruled.

The Fourth Amendment problem in this case was that the vial of blood taken from Appellant and provided to NCIS represented a distinct search and seizure from that undertaken incident to Appellant's

treatment for diabetes.[2] Whatever might be said of Appellant's expectation of privacy with regard to the blood draw itself, a search for DNA was not incident to his treatment for diabetes and was not otherwise authorized by warrant or warrant exception.

III.

If the military judge erred with respect to the blood drawn at the VA hospital, analytic emphasis turns to the second issue. Were the DNA test results obtained from the blood draw conducted pursuant to the search warrant admissible? Appellant argues that the military judge erred in upholding the magistrate's determination of probable cause, despite misleading statements made to the magistrate by NCIS agents, and the withholding from the magistrate facts relating to the exclusion of the original blood sample. The Government counters that, despite these omissions and misstatements, probable cause existed for the issuance of the warrant, and that the basis for the probable cause was independent of the initial DNA search. These issues were not fully adjudicated by the lower court in light of its determination of Issue I.

As is often the case in the Fourth Amendment context, the law is set but the facts are harder to fix. The question presented at this point is whether the third blood draw was a product of a warrant

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[2] The facts of this case do not require us to reconsider the extent, if any, to which M.R.E. 312(f) applies where, after valid medical testing, some of the remaining blood from the same vial was made available to the NCIS for its investigative purposes. See Stevenson II, 53 M.J. at 260.

predicated on information independent from the evidence adduced from the blood draw at the VA hospital. The answer necessarily entails a factual determination informed by the sometimes competing factual recitations of the parties. Therefore, we will remand to the lower court, for consideration of two related questions in light of our resolution of Issue I: first, to determine whether the warrant was derivative from a source of information independent from the seizure and search of Appellant's blood at the VA hospital; and second, to consider whether the warrant was valid in light of Appellant's argument that statements and omissions to the magistrate were not made in good faith.

DECISION

The decision of the United States Navy-Marine Corps Court of Criminal Appeals is set aside. The record of trial is returned to the Judge Advocate General for remand to that court for consideration of granted Issue II in light of our resolution of Issue I.

EFFRON, Chief Judge (concurring in part and in the result):

I agree with the majority that a remand is appropriate in this case. I would distinguish rather than overrule United States v. Fitten, 42 M.J. 179 (C.M.A. 1995), however. In Fitten, the catheterization for a valid medical purpose under Military Rule of Evidence (M.R.E.) 312(f) was prolonged to obtain a second bottle of urine for disciplinary purposes. 42 M.J. at 180. Once the

medical purpose under M.R.E. 312 was fulfilled, the non-probable cause warrantless search could be continued if it was otherwise reasonable under the Fourth Amendment. See M.R.E. 314(a); M.R.E. 314(k). . The Court in Fitten concluded that the search was reasonable under the specific circumstances of the case. 42 M.J. at 182.

Although Fitten considered the de minimis nature of the intrusion a factor in its Fourth Amendment reasonableness analysis, it did not establish a general principle of law that all de minimis additional extractions are inherently reasonable. Fitten did not relieve the government of its burden under M.R.E. 311(e) to demonstrate reasonableness under the Fourth Amendment when a search, initiated under M.R.E. 312(f), extends beyond the point when the medical purpose has been fulfilled.

In the present case, the search extended beyond the period required to fulfill a medical purpose under M.R.E. 312(f). Therefore, even if the extension was de minimis, the evidence obtained during the extension could be admitted at trial only if the extended search was reasonable under the Fourth Amendment.

Here, the object of the law enforcement search was DNA, a matter not involving time sensitivity or other circumstances that might make it reasonable to extend the search beyond the purpose of M.R.E. 312(f) without a search authorization. There was no risk of rapid dissipation or loss of evidence. The law enforcement officials in the present case could take whatever time was necessary to obtain a search

authorization, and Appellant's DNA would be the same as it was on the date of his visit to the hospital for the initial blood draw in this case. Under these circumstances, the extension of the search to draw the second vial was unreasonable, and the evidence derived from the search was inadmissible. Under other circumstances, a de minimis extension of an otherwise lawful intrusion might well be reasonable under the Fourth Amendment and the Military Rules of Evidence. M.R.E. 311; M.R.E. 314.

Appendix B

IN THE
U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH C.L. SCOVEL J.D. HARTY

UNITED STATES

v.

Walter S. STEVENSON
Hospital Corpsman Third Class (E-4), U. S. Navy

PUBLISH

NMCCA 200301272 Decided 24 July 2006

Sentence adjudged 31 October 2001. Military Judge: N. Kelstrom. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, Navy Personnel Command, Millington, TN.

LCDR M. EVERSOLE, JAGC, USNR, Appellate Defense Counsel
LT STEPHEN REYES, JAGC, USNR, Appellate Defense Counsel
Capt GLEN HINES, USMC, Appellate Government Counsel

HARTY, Judge:

A general court-martial, composed of officer and enlisted members, convicted the appellant, contrary to his pleas, of rape, in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The appellant was sentenced to confinement for 3 years and a dishonorable discharge. The convening authority approved the sentence as adjudged and, except for the dishonorable discharge, ordered it executed.

This case is before us for the second time. We first addressed this case in response to the Government's interlocutory appeal of the military judge's order suppressing evidence. The military judge suppressed the DNA test results of the appellant's blood drawn by the Veterans' Administration hospital, holding that the results were not admissible under MIL. R. EVID. 312(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), because the appellant was not a "servicemember" at the time the blood was drawn. Appellate Exhibit XV.[3] This court affirmed the military judge's decision in *United States v. Stevenson*, 52 M.J. 504 (N.M.Ct.Crim.App. 1999)(*Stevenson* I). Our superior court disagreed and returned the appellant's case to the Judge Advocate General of the Navy for remand to the court-martial for trial on the merits. *United States v. Stevenson*, 53 M.J. 257 (C.A.A.F. 2000)(*Stevenson*

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[3] The record contains appellate exhibits identified by Roman numerals and others by Arabic numerals. We will refer to appellate exhibits by the exhibit number appearing on that exhibit.

II). This case proceeded to trial and is now before us for appellate review.

We have considered the record of trial, the appellant's nine assignments of error,[4] and the

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[4] I. THE UNITED STATES NAVY VIOLATED ARTICLE 2(A)(4) OF THE UCMJ AND THE UNITED STATES CONSTITUTION BY EXERCISING COURT-MARTIAL JURISDICTION OVER [THE APPELLANT].

II. THE MILITARY JUDGE VIOLATED THE FOURTH AMENDMENT BY ADMITTING BLOOD AND DNA EVIDENCE TAKEN FROM [THE APPELLANT] ON 3 JUNE 1998.

III. THE MILITARY JUDGE ERRED BY ADMITTING BLOOD AND DNA EVIDENCE SEIZED PURSUANT TO AN INVALID SEARCH WARRANT ISSUED ON 15 SEPTEMBER 1999.

IV. APPELLANT'S RIGHT TO EQUAL ACCESS TO EVIDENCE WAS DENIED WHEN THE NAVAL CRIMINAL INVESTIGATIVE SERVICE DESTROYED POTENTIALLY EXCULPATORY EVIDENCE, THUS PREVENTING APPELLANT FROM OBTAINING A FAIR TRIAL.

V. THE MILITARY JUDGE ERRED BY ADMITTING DNA RESULTS THAT WERE BASED ON EVIDENCE THAT CONTAINED SERIOUS DEFECTS IN ITS CHAIN OF CUSTODY. (Numbered as assignment of error #4, Appellant's brief of 27 Dec 2004 at 52).

VI. THE EVIDENCE WAS FACTUALLY INSUFFICIENT TO CONVICT APPELLANT OF RAPE BECAUSE THE GOVERNMENT WAS UNABLE TO DEMONSTRATE WITH RELIABLE EVIDENCE THAT APPELLANT WAS THE ASSAILANT. (Numbered as assignment of error #5, Appellant's Brief at 54).

VII. THE DEFENSE DEMONSTRATED WITH CLEAR AND CONVINCING EVIDENCE THAT APPELLANT WAS LEGALLY INSANE AT THE TIME OF THE ALLEGED

Government's Answer. We find that the appellant is entitled to sentence relief due to post-trial delay. Otherwise, we find that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. *See* Arts. 59(a) and 66(c), UCMJ.[5]

INCIDENT. (Numbered as assignment of error #6, Appellant's brief at 57).

VIII. THIS COURT SHOULD PROVIDE APPELLANT WITH SENTENCING RELIEF FOR THE INORDINATE AND EXCESSIVE POST-TRIAL DELAY. (Numbered as assignment of error #7, Appellant's Brief at 59).

IX. BECAUSE THE OFFENSE OF RAPE IS NOT PUNISHABLE BY DEATH, THE STATUTE OF LIMITATIONS FOR RAPE IS FIVE YEARS AND, THEREFORE, THE MILITARY JUDGE ERRED IN FINDING THAT THE STATUTE OF LIMITATIONS HAD NOT EXPIRED.

[5] An employee of the United States Army Criminal Investigation Laboratory (USACIL) who has the same name as the USACIL employee identified in *United States v. Luke*, 63 M.J. 60, 62 (C.A.A.F. 2006), was involved in the basic serology identification of bodily fluids and blood typing of evidence in the appellant's case in 1993. Record at 1060. The Government, in response to Orders to Show Cause, has produced USACIL documents concerning that employee's misconduct occurring in 2003 and 2005. However, the Government has not been able to verify that employee's involvement in the appellant's case. Assuming that the same employee was involved in the appellant's serology, we conclude that: (1) there is no evidence of USACIL misconduct in the appellant's case; (2) there was no way for the Government, in 1993, to know that the USACIL employee identified in *Luke* would be involved in misconduct in 2003 and 2005; and (3) there is no possibility that the USACIL employee's misconduct in 2003 and 2005 could be exculpatory

Background

On 23 November 1992, KT was raped by an unidentified assailant in her base housing apartment in Honolulu, Hawaii. The rape was immediately reported and a rape kit examination was performed. A special agent of the Naval Criminal Investigative Service (NCIS) was present during the exam, took custody of the evidence obtained, and logged the rape kit into the NCIS evidence facility. A different NCIS special agent collected physical evidence from KT's apartment, including cuttings from the mattress upon which the rape occurred. This evidence was also logged into the NCIS evidence facility.

The seized evidence was sent to the United States Army Criminal Investigation Laboratory USACIL to extract high molecular weight deoxyribonucleic acid (DNA) for comparison and identification purposes. Part of the extracted DNA was consumed in the original examination conducted by Restriction Fragment Length Polymorphism (RFLP), and the balance was frozen for later use. The rape kit and mattress cuttings were returned to NCIS in Hawaii.

In July and August 1994, less than two years after KT was raped, NCIS destroyed the rape kit samples, mattress cuttings, fingerprints lifted from the victim's purse that had been found at a local mall, and all chain-of-custody documents. Other evidence was returned to the victim. At the time of

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evidence requiring disclosure in 1998.

destruction, additional DNA could have been extracted from the destroyed rape kit samples and mattress cuttings.

At the time of the rape, the appellant lived in the same base housing development as KT. In July 1994, the appellant was transferred to the temporary disability retirement list (TDRL) with a 30% disability rating, because he suffered, in part, from a mental illness diagnosed as schizophreniform.[6] The Veteran's Administration (VA), however, rated the appellant as 100% disabled in the fall of 1994. In December 1994, the appellant waived his right to receive military disability retired pay in favor of receiving greater compensation from the VA. This election, however, did not remove the appellant from the TDRL.

In 1995, a cold-case NCIS special agent was assigned to review the unsolved rape of KT. This agent found a report of the appellant looking into a different woman's bedroom window late at night in KT's housing area. The report stated that the appellant was positively identified by the apartment's occupant, who stated that the appellant was naked as he peered in her window. This incident predated KT's rape by approximately six months. Based on this lead, the special agent obtained the appellant's blood type through the Defense Enrollment Eligibility Reporting System (DEERS) and discovered it was the same as the person who raped KT, according to USACIL. At this

[6] At time of trial, however, the appellant was diagnosed as suffering from schizophrenia.

point, NCIS wanted to include or exclude the appellant as a possible suspect by obtaining blood or other samples from the appellant for DNA analysis. The case was officially reopened in November, 1997.

Rather than requesting a blood sample directly from the appellant, NCIS contacted the VA and requested that additional blood be drawn from the appellant the next time he reported for routine blood work. In June 1998, the appellant reported to the Memphis VA Hospital for a routine blood draw for his diabetes check. The lab technician drew blood for medical purposes and, without removing the needle from the appellant's arm, drew a second tube of blood for the NCIS. The NCIS picked the blood up and sent it to USACIL for DNA testing. The appellant was not informed that the second tube of blood was drawn for law enforcement purposes.

USACIL conducted DNA testing on the appellant's blood and determined that when compared to the DNA extracted from KT's rape kit and mattress cuttings, the appellant's profile frequency in the unrelated African-American population in the U.S. established that he was the individual who committed the rape.[7] USACIL consumed the last of the extracted DNA during this testing. With the Secretary of the Navy's authorization, a single charge of rape was preferred on 16 December 1998. The appellant was arrested the next day and placed in pretrial confinement, but was not returned to active duty.

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[7] The appellant is African-American.

On 15 September 1999, following the filing of its interlocutory appeal but before this court issued its decision on that appeal in *Stevenson* I,[8] NCIS obtained a search warrant from a U.S. Magistrate Judge to seize a sample of the appellant's blood. That warrant was executed on 22 September 1999, and the seized evidence was sent to USACIL for DNA analysis. Using the same RFLP analysis as before, USACIL came up with the same approximate frequency of the appellant's profile within the same population as before.

Jurisdiction

For his first assignment of error, the appellant claims there was no personal jurisdiction to try him by court-martial. Specifically, the appellant asserts that although he was transferred to the TDRL, he waived his right to receive military disability retired pay in favor of receiving disability compensation from the VA. Therefore, he was not "entitled to pay" as required by Article 2(a)(4), UCMJ. Appellant's Brief at 10. The Government summarily asserts that our superior court's holding in *Stevenson* II resolves this issue without any need for further discussion.

In resolving whether MILITARY RULE OF EVIDENCE 312(f), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) applies to members of the TDRL, our superior court answered the question in the affirmative, stating in part that

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[8] *Stevenson I* was decided on 10 October 1999.

> In view of the receipt of military pay and the potential for further active duty service by members who are temporarily removed from active duty by reason of disability, we conclude that evidence obtained in compliance with Mil. R. Evid. 312(f) may be used in a court-martial of a person on the TDRL.

Stevenson, 53 M.J. at 260. Although our superior court cited *United States v. Bowie*, 34 C.M.R. 411 (C.M.A. 1964)(holding that members on the TDRL are subject to court-martial jurisdiction under Article 2, UCMJ) to resolve the MIL. R. EVID. 312(f) issue, the issue of personal jurisdiction under Article 2(a)(4), UCMJ, was not squarely before the court.

In *Bowie*, the issue was whether there was personal jurisdiction for court-martial purposes over a former active duty service member who was placed on the TDRL and was receiving military disabled retired pay. Answering the question in the affirmative, our superior court stated

> [T]he Uniform Code does not distinguish between retirees, on the basis of the reason for retirement; all retirees receiving pay are subject to its provisions. As we noted in the *Hooper* case, there are no "limitations or conditions put upon the exercise of the jurisdiction" over this class of persons.

34 C.M.R. at 412 (quoting *United States v. Hooper*, 26 C.M.R. 417, 420 (C.M.A. 1958)(holding that a person who retires from active duty based on

longevity may be subjected to court-martial jurisdiction for crimes committed after retirement.)).

The case *sub judice*, however, can be distinguished from both *Bowie* and *Hooper*, because each of those cases involved the actual receipt of retired pay. The appellant was not receiving retired pay. He waived that right in favor of receiving VA disability compensation. We do not believe, however, that this distinction changes the analysis or the result.

Article 2(a)(4), UCMJ, provides that "[r]etired members of a regular component of the armed forces who are entitled to pay" are subject to the Uniform Code of Military Justice. A plain reading of that Article indicates the entitlement to receive retired pay, and not the actual receipt of that pay, is the condition precedent to exercising court-martial jurisdiction over a retiree. The appellant had been entitled to military disability retired pay. The narrow question is whether the appellant was still "entitled to pay," and whether that was enough for court-martial jurisdiction.

A member of the TDRL who waives his or her military disability retired pay in favor of VA disability compensation has the option of renouncing the VA disability compensation and returning to his or her prior entitlement to military disability retired pay. *See* Department of Defense Financial Management Regulation, Volume 7B, Paragraph 120204.[9] Under the appellant's theory, a person

[9] "120204. Withdrawal. A retiree who has waived retired pay in favor of VA benefits may withdraw the waiver and elect to

could avoid court-martial jurisdiction simply by renouncing military disability retired pay in favor of VA disability compensation, while at the same time retaining the option to return to his or her military disability retired pay entitlement.[10] We do not believe that Congress intended such a result.

We hold that a member of the TDRL who has waived military disability retired pay in favor of VA disability compensation is still "entitled to pay" and, therefore, subject to court-martial jurisdiction pursuant to Article 2(a)(4), UCMJ. This issue is without merit.

Admissibility of DNA Evidence Obtained From Blood Drawn by VA

For his second assignment of error, the appellant claims the military judge erred by denying the appellant's motion to suppress the DNA analysis of the blood drawn by the VA. Specifically, the appellant asserts that the VA medical personnel were acting as agents of the Government when they seized the appellant's blood without a warrant, and that no exceptions to the warrant requirement applied. Appellant's Brief at 19. We disagree.[11]

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receive retired pay at that time . . . . Renouncement of VA benefits does not preclude the retiree from filing a new waiver of retired pay at a later date, enabling the retiree to receive VA benefits again . . . ."

[10] Unless the application to return to military disability retired pay is filed within one year of the prior termination, it is treated as a new application. *See* 38 U.S.C. § 5306(b).

[11] Because we find that the appellant's blood drawn by the VA

We review a military judge's ruling on a motion to suppress for abuse of discretion. *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)(citing *United States v. Monroe*, 52 M.J. 326, 330 (C.A.A.F. 2000)). "We review factfinding under the clearly-erroneous standard and conclusions of law under the de novo standard . . . . On mixed questions of law and fact . . . 'a military judge abuses his discretion if his findings of fact are clearly erroneous or his conclusions of law are incorrect.'" *Id.* (quoting *United States v. Ayala*, 43 M.J. 296, 298 (C.A.A.F. 1995)). "'In reviewing a ruling on a motion to suppress, we consider the evidence in the light most favorable to the prevailing party.'" *Id.* at 247-48 (quoting *United States v. Reister*, 44 M.J. 409, 413 (C.A.A.F. 1996)(internal quotations omitted)).

We need not address each issue raised by the appellant in this assignment of error, because the holding in *United States v. Fitten*, 42 M.J. 179 (C.A.A.F. 1995), is dispositive.[12] In *Fitten*, the accused was subjected to an involuntary catheterization to obtain a urine sample for medical purposes in a hospital setting by hospital personnel. The accused's command also wanted a urine sample in order to test for drugs, but the accused refused to give a urine sample for that purpose. The hospital

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was done lawfully, the appellant's third assignment of error challenging the subsequent search warrant is moot. *See Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

[12] Our superior court directed the military judge, on remand, to specifically address the *Fitten* analysis. *Stevenson*, 53 M.J. at 260.

obtained a urine sample for its own medical use and an additional urine sample for the command's use. Both urine samples were obtained from the same catheterization. After a thorough review of the case law giving rise to Mil. R. Evid. 312(f), Judge Crawford, writing for a unanimous court, found that the accused did not suffer a violation of any constitutional right, stating, in part:

> 16. Here, the taking of the body fluid from appellant was motivated by medical personnel concerned for appellant's health. The testing was not directed by the command or law enforcement officials. Rather, the test was conducted by medical personnel in a medical environment. The test was reasonably necessary to determine if there was life-threatening trauma or injury as a result of drugs or alcohol in the blood. The desires of the command had no impact on the initial intrusion and did not cause any additional intrusion. On the contrary, the command's request resulted in a de minimis impact by prolonging the flow of urine only long enough to fill a second bottle.
>
> 17. There was a valid medical purpose for the catheterization procedure. It was performed in a hospital by medical personnel. Any "intrusion" was de minimis and does not shock the conscience. For these reasons we hold that there was no violation of appellant's rights under the Fourth Amendment, the Due Process Clause of the

> Fifth Amendment, or the Military Rules of Evidence.

Id. at 182.

Applying the *Fitten* analysis to the case *sub judice*, the military judge entered detailed findings of fact, including, in part, that: (1) the appellant's blood draw was motivated by medical personnel concerned for appellant's health - his diabetes; (2) the blood draw was not directed by law enforcement officials - it was conducted as part of the appellant's ongoing medical treatment at the VA hospital; (3) the blood draw was conducted by medical personnel in a VA hospital environment; (4) the NCIS request for a blood sample had no impact on the initial needle intrusion and did not cause any additional intrusion - the first tube of blood was for the VA hospital's use and the second tube was obtained using the initial needle insertion; (5) the NCIS request for a blood sample resulted in a de minimis impact by prolonging the time the needle was in the appellant's arm only by a few seconds - only long enough to collect two cubic centiliters of blood (less than 1/2 teaspoon); and, (6) the initial blood draw was for a valid medical purpose and necessary to preserve the health of a service member. AE CIV.

Our superior court, in *Stevenson* II, directed the military judge to address the additional issue of "whether there is a legally significant difference between the nature of the fluid extracted in this case as compared to *Fitten* (e.g., blood versus urine)." 53 M.J. at 260-61. In response, the military judge distinguished urine and blood, finding that urine is human waste that may contain fleeting evidence of a

possible crime, while blood is not a waste product, is not secreted by the human body absent injury or illness, and potentially contains permanent evidence that an individual has or has not committed a crime - DNA. The military judge determined that while the two bodily fluids are qualitatively different, that difference is not legally significant and does not change the *Fitten* analysis. AE CIV at 5, ¶¶ e and f.

The military judge's factual findings are supported by the record, are not clearly erroneous, and we adopt them as our own. Based on our *de novo* review of whether the qualitative difference between urine and blood changes the *Fitten* analysis, we concur with the military judge and conclude that it does not. We further find that the facts in this case are not shocking to the conscience. The military judge did not abuse his discretion. This issue is without merit.

Destroyed Evidence

For his fourth assignment of error, the appellant claims that the destruction of the rape kit samples and mattress cuttings by NCIS prevented him from receiving a fair trial. Appellant's Brief at 41. We disagree.

"Parties to a court-martial are entitled to an 'equal opportunity to obtain witnesses and other evidence[.]'" *United States v. Rodriguez*, 60 M.J. 239, 246 (C.A.A.F. 2004)(quoting Article 46, UCMJ). They also have the right to "compulsory process." RULE FOR COURTS-MARTIAL 703(a), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). But they are not entitled to the production of evidence

that has been destroyed, lost, or is not otherwise subject to compulsory process. R.C.M. 703(f)(2). A military accused also has a constitutional right to the disclosure of material exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). When material exculpatory evidence is not disclosed, the good or bad faith of the Government in destroying that evidence is irrelevant. *Illinois v. Fisher*, 540 U.S. 544, 547 (2004).

Whether the military judge correctly denied the defense motion to suppress depends on whether the destroyed evidence was "material exculpatory evidence" or simply "potentially useful evidence," and, if the latter, whether NCIS acted in bad faith. *Id.* at 547-48. "Potentially useful evidence" includes evidence "of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* (quoting *Arizona v. Youngblood*, 488 U.S. 51, 57 (1988)). If the Government, in bad faith, destroyed "potentially useful evidence," the exclusionary rule could be invoked. *Id.*

After hearing testimony, observing the witnesses, and hearing argument of counsel, the military judge issued detailed findings of fact. AE 80. These findings include the following: (1) the evidence was destroyed in accordance with the NCIS unwritten standard operating procedure;[13] (2) the evidence was

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[13] In 1994, the NCIS unwritten standard operating procedures for destruction of evidence was as follows: if a suspect had not been identified for an "unreasonable amount of time", it was within the discretion of the Special Agent in Charge—delegated

not destroyed with the intent to deny an unknown accused[14] of the opportunity to obtain exculpatory evidence through additional testing; (3) the evidence was not destroyed in bad faith; (4) the appellant failed to show that the destroyed evidence had apparent exculpatory value at the time of destruction; and, (5) the appellant failed to show that the destroyed evidence was essential to a fair trial. *Id.* These findings of fact are supported by the record, are not clearly erroneous, and we adopt them as our own.

In the interest of fairness and to ensure that the appellant received a fair trial, the military judge imposed the following remedies pursuant to R.C.M. 703(f)(2): (1) the Government was not allowed to impeach a defense DNA expert on the grounds that he or she had not actually tested the destroyed rape kit samples or mattress cuttings; (2) the Government was not allowed to offer any evidence concerning the victim's purse or the fingerprints lifted from the purse; (3) the Government was not allowed to offer any evidence showing the proximity of the purse's location to the housing area where the appellant lived; (4) the appellant was allowed to fully develop its theory regarding the greater discriminating

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to the Assistant Special Agent in Charge—to order the evidence destroyed. Record at 581-83. The evidence was seized on 23 November 1992 and destroyed on 29 July and 17 August 1994. Prosecution Exhibit 4.

[14] The appellant was not developed as a possible suspect until the NCIS cold-case special agent was assigned to the case in 1995. Record at 956. NCIS did not officially re-open the case, however, until November, 1997. AE XV at 1, ¶ 5.

ability of the polymerase chain reaction-short tandem repeat (PCR-STR) DNA analysis over the RFLP DNA analysis and that he was denied the opportunity to use the more discriminating analysis because the Government destroyed the evidence; and, (5) the Government was not allowed to bolster or rehabilitate its DNA expert by showing that if the evidence had not been destroyed and was tested using PCR-STR DNA analysis, it could have led to a greater probability of a match between the unknown donor and the appellant's DNA. *Id.* at 9-10, ¶¶ 22 and 23.

We review a military judge's ruling on a motion to suppress for abuse of discretion, and in that process "we consider the evidence 'in the light most favorable to the' prevailing party." *Rodriguez*, 60 M.J. at 246-47 (quoting *Reister*, 44 M.J. at 413). In this case, it is clear that the military judge found that the destroyed evidence was no more than "potentially useful evidence," that it did not have apparent exculpatory value, and that NCIS had not acted in bad faith in disposing of the evidence. These conclusions are clearly supported by the record and the law. Accordingly, we hold that the military judge did not abuse his discretion in denying the motion to suppress, and that the remedies imposed were adequate to ensure that the appellant was not disadvantaged by not being able to conduct independent analysis of DNA extracted from the destroyed evidence.

Even if we were to conclude that the NCIS evidence destruction policy in this case required a firm two-year wait from the date of crime to the date

of evidence destruction, and, therefore, that the premature destruction violated that NCIS policy, we still would not grant relief. If NCIS waited until 24 November 2004 to destroy the evidence, the appellant would still be without that evidence. There was no request to retain the evidence, nor could there have been, because the appellant was not developed as a potential suspect until some time in 1995 and not confirmed as a suspect until 1998. Although NCIS, as a result of this case, took remedial measures by establishing an indefinite period of evidence retention for evidence potentially containing DNA, we cannot say that the policy executed in this case was unreasonable at the time. *See United States v. Madigan*, 63 M.J. 118, slip op. at 11 (C.A.A.F. May 1, 2006). This issue is without merit.

Chain-of-Custody

For his fifth assignment of error, the appellant claims the military judge erred by admitting the DNA results, because of defects in the chain of custody for the rape kit samples and mattress cuttings. Specifically, the appellant claims that a proper chain of custody cannot be established because the original documents were destroyed. Appellant's Brief at 52. We disagree.

We review challenges to the admissibility of evidence under an abuse of discretion standard. *Ayala*, 43 M.J. at 298; *United States v. Sullivan*, 42 M.J. 360, 363 (C.A.A.F. 1995). With respect to the admissibility of the DNA test results, the Government has the burden of establishing a reasonable probability that the evidence, from which

DNA was extracted, was in fact the purported rape kit samples and the mattress cuttings collected in this case, and that the evidence was not altered. *See United States v. Maxwell*, 38 M.J. 148, 150 (C.M.A. 1993)(dealing with blood alcohol test results). Although the official chain-of-custody documents for the rape kit samples and mattress cuttings were destroyed with the evidence, the Government may carry its burden by other means.

The NCIS special agent who was present in the hospital examining room during the victim's rape kit examination, and the NCIS special agent who personally collected the mattress cuttings, testified that they personally collected the evidence and delivered it to the NCIS consolidated evidence facility. The NCIS evidence facility's evidence logbook was admitted into evidence showing receipt of that evidence. PE-4. That exhibit shows the evidence was mailed by registered mailed to USACIL for testing. A stipulation of expected testimony shows that packages bearing the same registered mail numbers were received at USACIL. PE 16.

We conclude that the military judge did not abuse his discretion in admitting the DNA analysis based on DNA extracted from the rape kit samples and mattress cuttings. Any gaps in the chain-of-custody go to the weight of the evidence rather than its admissibility. Furthermore, the military judge properly instructed the members that the chain-of-custody was in dispute and that the members must be satisfied beyond a reasonable doubt that the DNA extracted by USACIL came from the rape kit

samples that originated from the victim and the mattress cuttings that came from the crime scene, and that these items were not tampered with or contaminated prior to testing. AE XCVIII at 2-3; Record at 1335-38. This issue is without merit.

Insanity Defense

For his seventh assignment of error,[15] the appellant claims that the record contains clear and convincing evidence that the appellant was not mentally responsible for his actions at the time of the rape. Appellant's Brief at 57. We disagree.

In determining whether the members' findings were correct in fact, we must weigh the evidence and determine for ourselves whether the appellant met his burden of demonstrating by clear and convincing evidence that, at the time of the offense, he lacked mental responsibility. R.C.M. 916(b). In determining whether the members' findings were correct in law, we must view the evidence and all reasonable inferences in the light most favorable to the Government and determine whether a court-martial composed of reasonable members could have found that the appellant failed to prove lack of mental responsibility by clear and convincing

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[15] We have considered the appellant's sixth assignment of error, claiming the evidence is factually insufficient because the Government was unable to demonstrate with reliable evidence that the appellant was the rapist. We specifically find beyond a reasonable doubt that the Government's evidence is reliable and is factually sufficient to identify the appellant as the person who committed the charged rape. This assignment of error is without merit.

evidence. *United States v. Martin*, 56 M.J. 97, 104 (C.A.A.F. 2001). "Clear and convincing evidence is that weight of proof which 'produces in the mind of the factfinder a firm belief or conviction that the allegations in question are true.'" *Id.* (quoting CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 3:10 at 239 (7th ed. 1992)).

The affirmative defense of lack of mental responsibility requires proof that at the time of the offense, the accused suffered from a "severe mental disease or defect" and as a result, was "unable to appreciate the nature and quality or the wrongfulness of the acts." Art. 50a(a), UCMJ. The appellant could logically and legally satisfy this test by demonstrating that he lacked mental responsibility over a period of time that includes the time of the rape. The Government, however, may logically and legally rebut this by demonstrating that the appellant was mentally responsible at the time of the rape. *Martin*, 56 M.J. at 99.

It was undisputed that the appellant, at the time of trial, was diagnosed as suffering from schizophrenia, a severe mental disease or defect under Article 50a(a), UCMJ. There was dispute, however, over when that disorder first presented itself. The defense expert testified that the disorder presented itself prior to the rape, and the Government expert testified that it did not. The defense expert testified that the appellant was suffering from a psychotic episode at the time of the rape and that the appellant could not appreciate the nature and quality or the wrongfulness of his acts during that psychotic episode. The defense expert

further stated that a person can demonstrate planned behavior, such as hiding his identity during the crime, during a psychotic episode and still not be able to appreciate the nature and quality or the wrongfulness of the acts. The Government's expert, however, testified that behavior such as wearing gloves, telling the victim not to look at him, covering the victim's head so she could not see him, and perpetrating the crime in the dark of night, all indicated the appellant's awareness of what he was doing and the wrongfulness of those acts. As the Government expert stated: "most human beings do not go to any great length to conceal behavior that they, for whatever reason, don't feel is shameful or wrongful in some fashion. If there's no wrongfulness, why go to the extent of concealing it?"[16] Record at 1255.

Under these circumstances, we conclude there is substantial evidence in the record supporting the members' finding of fact that the appellant did not lack mental responsibility at the time of the rape.[17] Therefore, we hold that a reasonable trier of fact could have found that the appellant failed to prove

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[16] The victim testified that the rapist wore gloves, told her that he had a knife, not to look at him, covered her head, asked her when her husband was coming home, and tied her up after raping her. Record at 831-38.

[17] *See Martin*, 56 M.J. at 107 (adopting a "substantial evidence" standard of review to determine the "reasonableness" of a finding of fact by members on the question of mental responsibility as announced in *United States v. Barton*, 992 F.2d 66, 68 (5th Cir. 1993); and, *United States v. Abou-Kassem*, 78 F.3d 161, 166 (5th Cir. 1996).

by clear and convincing evidence his affirmative defense of lack of mental responsibility. We are, ourselves, convinced that the appellant failed to establish the affirmative defense of lack of mental responsibility by a clear and convincing standard. This issue is without merit.

Post-Trial Delay

For his eighth assignment of error, the appellant claims he is entitled to Article 66(c), UCMJ, sentence relief in the form of disapproving the dishonorable discharge, due to excessive post-trial delay. He points specifically to 608 days that elapsed between the date of sentencing[18] and docketing the case with this court,[19] claiming that: (1) the record was assembled on day 233; (2) the staff judge advocate (SJA) issued his recommendation (SJAR) on day 463; (3) the convening authority (CA) took his action on day 475; and, (4) the case was docketed with this court on day 608. Appellant's Brief at 59. Although the appellant limits his request to Article 66(c), UCMJ, relief, we will also conduct a due process analysis.

We consider four factors in determining if post-trial delay violates the appellant's due process rights: (1) the length of the delay; (2) the reasons for the delay; (3) the appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States*, 60 M.J. 100,

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[18] 31 October 2001.

[19] 1 July 2003.

102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must still balance the length of the delay against the other three factors. *Id.*

We review four post-trial processing periods for delay. Those include: (1) from date of sentencing to CA's action; (2) from CA's action to docketing with this court; (3) from docketing to final briefing; and, (4) from final briefing to opinion. *See United States v. Moreno*, 63 M.J. 129, slip op. at 15-16 (C.A.A.F. 2006). Here, 475 days elapsed from the date of sentencing until the CA's action. We find that period facially unreasonable, even for a contested general court-martial with members, covering 1,463 pages of record, an additional three volumes of exhibits, and involving 22 pretrial motions. Another 123 days elapsed from the date of the CA's action until docketing with this court. We also find this delay to be facially unreasonable. Another 545 days passed before the appellate defense counsel submitted his final brief, and 156 more days before the Government filed its brief. This case has been in panel for more than one year waiting for a final decision. We find the total delay in this case to be facially unreasonable. We will analyze the delay for a violation of the appellant's due process rights.

1. Length and reason for delay

The SJA explained the delay from date of sentencing to date of SJAR, asserting a reduction in certified personnel to transcribe the record of trial and his personal workload as significant contributors. SJAR of 6 Feb 2003 at 3-6. The CA took his action 12 days later. Our superior court weighs personnel-related causes of delay, during this period, against the Government absent a showing of exceptional circumstances. *Moreno*, 63 M.J. 129, slip op. at 15. The Government's explanation does not reveal any exceptional circumstances causing this delay. Therefore, this weighs against the Government, as does the 123 days it took the Government to simply get the record of trial to this court. *Id.*, slip op. at 16. As in *Moreno*, the longest period of delay in this case runs from docketing to final briefing by the parties. Without going into the personnel issues involved, we note that our superior court has held that staffing issues are not held against the appellant, and weighs this against the Government. *Id.*, slip op. at 16-18. Nor shall the more than one year it has taken to issue an opinion in this case be held against the appellant. *Id.*, slip op. at 18.

2. Demand for speedy review

We note that the assistant trial defense counsel correctly anticipated post-trial delay, and sent a demand for speedy post-trial review to the CA several weeks prior to the date the appellant was found guilty. Record at 1150; SJAR at 4. This also weighs against the Government. Even if the appellant had not asserted his right to speedy

review, we note that our superior court does not weigh a failure to request speedy review heavily against an appellant. *Moreno*, 63 M.J. 129, slip op. at 19-20.

3. Prejudice

The appellant claims he has suffered prejudice, because: (1) he served his confinement sentence before appellant review was completed; and, (2) he was unable to bring his appellate issues before this court in a timely fashion. If we found prejudicial error in the appellant's court-martial, which we do not, the appellant's claim could be sufficient to establish a finding of prejudice under a due process analysis. However, because we do not find prejudicial error, the appellant's claimed prejudice is no more than that suffered by any accused serving a lawful confinement sentence. *Id.*, slip op. at 22. Because we conclude that the appellant's assignments of error are without merit, we also conclude that the appellant has not suffered prejudice from not being able to present those issues to this court at an earlier time. Under the totality of these circumstances, we conclude that there has been no due process violation resulting from the post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ. *United States v. Toohey*, 60 M.J. 100, 103 (C.A.A.F. 2004); *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F 2002). Considering the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc), we believe the

extreme amount of time that the appellant's case has languished in post-trial review makes sentencing relief appropriate. We will take action in our decretal paragraph.

Conclusion

Accordingly, we affirm the findings of guilty and only that portion of the sentence as extends to a bad-conduct discharge and confinement for three years.[20]

Chief Judge ROLPH and Senior Judge SCOVEL concur.

For the Court

R.H. TROIDL
Clerk of Court

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[20] We have considered the appellant's ninth assignment of error claiming that because the death sentence cannot be imposed for the rape of an adult, citing *Coker v. Georgia*, 433 U.S. 584 (1977), the statute of limitations for rape is five years, and, therefore, the appellant was brought to trial outside the statute of limitations for rape. We find that there is no statute of limitations for rape based on the plain language of Art. 43(a), UCMJ, and MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 45e(1). *See also Willenbring v. Neurater*, 48 M.J. 152, 178 (C.A.A.F. 1998).

Appendix C

NAVY-MARINE CORPS TRIAL JUDICIARY
MIDWEST JUDICIAL CIRCUIT

UNITED STATES OF AMERICA	GENERAL COURT-MARTIAL
	MOTION TO DISMISS LACK OF JURISDICTION
WALTER S.STEVENSON	

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1. The motion to dismiss for lack of personal jurisdiction is denied.

2. . The factual basis for this decision are not in dispute. The Court adopts both the facts asserted in the Trial and Defense Counsel motions as they do not contradict each other. As such the findings of fact are as follows:

20 Aug 1987: Walter Stevenson enlists in the Navy and begins a period of active duty service.

30 Jan 1991: Mr. Stevenson extends his enlistment for thirty-one (31) months.

23 Nov 1992: Ms. Kari Thiele allegedly raped.

19 Mar 1994: Mr. Stevenson's expiration of enlistment (EAOS—end of active obligated service). Mr. Stevenson involuntarily held on active duty for medical processing.

15 Jul 1994: Subsequent to the decision of a Physical Evaluation Board (PEB), Mr. Stevenson discharged from the Naval Service with an honorable discharge and transferred to the Temporary Disabled Retired List (TDRL) at a disability rate of 30%. Under this rate the accussed is entitled to approximately $600 per month retirement pay.

15 Sep 1994: Last Leave and Earnings Statement issued to Mr. Stevenson, showing net pay of $818.34. Remarks section states, "Account re-computed—beginning leave balance adjusted. This LES reflects the amount of your final payment. Your last check will arrive under separate cover." 1994 is the last year that Mr. Stevenson receives any pay or remuneration of any sort from the United States Navy or any other branch of the armed forces.

Fall 1994: Mr. Stevenson is evaluated by the Veteran's Administration (VA) and is found 100 % disabled.

23 Dec 1994: Mr. R. W. Palmer, Adjudication Officer for the VA, on behalf of Mr. Stevenson, submits VA Form 21-651a, "Notice of Election of Compensation in lieu of Retired Pay or Waiver of Retired Pay to Secure Compensation from the Veterans Administration."

20 Jan 1995: The Defense Finance and Accounting Service (DFAS) in Cleveland completes section two of Mr. Stevenson's waiver form. Block 13 states that Mr. Stevenson's retired pay has been

"discontinued in its full amount" effective 01 Nov 1994. Mr. Stevenson thereafter begins to receive 100% VA compensation. There is no evidence that Mr. Stevenson was ever actually paid any military retired pay prior to waiving his retired pay for VA compensation.

29 Jul 1996: The Chief of Naval Personnel informs Mr. Stevenson via letter Pers-271/PJS 308-70-4093 of 29 Jul 96 that his retired pay is discontinued for failure to report for periodic physical examinations. The letter is sent via the Defense Finance and Accounting Service directing that office to stop payment of retired pay to Mr. Stevenson. A copy of the letter is also sent to the CO, NRPC, New Orleans, LA.

Nov 1997: NCIS reopens investigation with Mr. Stevenson as a suspect.

27 May 1998: NCIS faxes a memo to VA Hospital at which Mr. Stevenson was being treated requesting assistance in obtaining a sample of Mr. Stevenson's blood.

3 Jun 1998: VA Hospital personnel obtain a sample of Mr. Stevenson's blood. This sample obtained without Mr. Stevenson's consent.

Oct 1998: Secretary of the Navy authorizes apprehension, pretrial restraint, and court-martial of Mr. Stevenson.

16 Dec 1998: Single charge of rape preferred against Mr. Stevenson.

17 Dec 1998: Mr. Stevenson is arrested by NCIS and confined to the brig at NAS Pensacola, Florida. Mr. Stevenson is never recalled to active duty. Mr. Stevenson receives no pay from the United States Navy or any other branch of the armed forces.

05 Feb 1999: A single charge of rape against Mr. Stevenson is referred to General Court-Martial by Commander, Navy Personnel Command. On the Charge Sheet, block 6, Current Service, is blank. Block 7, Pay per Month, states, "NONE."

02 Sep 1999: Navy-Marine Corps Court of Criminal Appeals grants Mr. Stevenson's Petition for Writ of Mandamus; the Military Judge (Kreichelt, J.) orders Mr. Stevenson released from pretrial confinement. Mr. Stevenson returns home. At no time during his confinement in the NAS Pensacola brig does Mr. Stevenson ever receive any pay from the United States Navy or any other branch of the armed forces.

July 1994 – present: At no time since being honorably discharged and placed on the TDRL did Mr. Stevenson render any military service, perform any military duty, or receive any military pay.

3. Conclusions of law:

Article 2(a)(4), UCMJ, 10 USC 802(a)(4) confers jurisdiction to "retirees of a regular component of the armed forces entitled to pay." The issue in this case is what does "entitled to pay" mean.

This court concludes that the time period to consider for attachment of personal jurisdiction is October 1998, when permission was sought and received from the Secretary of the Navy to apprehend, charge, and try HM3 Stevenson. This was the first time "action with a view towards trial" was taken in this case. RCM 201(c)(1).

HMC Stevenson's status at the time was as a servicemember on the TDRL who had waived his 30% disability retirement pay in lieu of the more favorable 100% VA compensation. This court finds this does not change HM3 Stevenson's "entitlement to pay." If one accepted the defense theory, an accused could escape jurisdiction with the mere filing of a VA form, whether it increases of decreases his retirement benefits. Indeed, in the face of potential charges, one could waive disability retired pay, elect the VA compensation even at a decreased compensation, wait for the charges to blow over by avoiding jurisdiction, and then revert back to the more lucrative retirement pay. See affidavit of William Tyminski, Director of Retired Pay Operations in Trial Counsel's brief. The entitlement is still there. To follow the defense theory would be to ignore what is merely a bookkeeping maneuver designed to secure the greatest possible retirement benefit for the military retiree and to prevent double payment of retirement benefits. The accused is still "entitled" to receive pay. His wavier is merely using his entitlement it in a manner to secure greater compensation via the VA. As such and in accordance with the cases cited in the Trial Counsel's brief, Hooper, Bowie, McKay, and Stevenson,

IT IS HEREBY ORDERED,

The court has personal jurisdiction over the accused.

/s/
P. J. STRAUB
MILITARY JUDGE
7 June 01

Appendix D

UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS

Walter S. STEVENSON xxx xx xxxx Petitioner v. Peter STRAUB CDR, JAGC, USN Military Judge and Gerald L. HOEWING RADM, USN Commander, Navy Personnel Command and UNITED STATES Respondents	)	PETITION FOR EXTRAORDINARY RELIEF IN THE NATURE OF A WRIT OF MANDAMUS AND STAY OF THE GENERAL COURT- MARTIAL BELOW NMCM No. 9900769 O R D E R

Upon consideration of the Petition for Extraordinary Relief in the Nature of A Writ of Mandamus and Motion for a Stay of the General Court-Martial Below, filed by trial defense counsel on behalf of the petitioner on 19 July 2001, it is, by the Court, this 23rd day of July 2001,

ORDERED:

(1) That the request for a stay of proceedings is denied.

(2) That the Petition for Extraordinary Relief in the Nature of A Writ of Mandamus is denied without prejudice to the petitioner's right to raise the arguments contained in his petition during the normal course of appellate review, if the petitioner is convicted. We find that the petitioner has not sustained his burden of demonstrating that his is a truly extraordinary situation where no other means of appeal or review exist, and that he is entitled to extraordinary relief as a clear and indisputable right. *See Aviz v. Carver*, 36 M.J. 1026, 1028 (N.M.C.M.R. 1993) (*citing United States v. LaBella*, 15 M.J. 228, (C.M.A. 1983)).

For the Court

R.H. TROIDL
Clerk of Court
23 July 2001

Copy to:
NMCCA (71)
45 (LT Eversole)
46
02

Appendix E

United States Court of Appeals for the Armed Forces
Washington, D.C. 20442-0001

UNITED STATES, Appellee	)	USCA MISC. Dkt. No. 01-8035/NA Crim. App. Dkt. No. 99-0769
v.	)	ORDER
Walter S. STEVENSON (xxx-xx-xxxx), Appellant	)	

On consideration of the writ-appeal petition, it is, by the Court, this 12th day of September, 2001,

ORDERED:

That said writ-appeal petition is hereby denied without prejudice to appellant's right to raise the matters asserted in the writ-appeal during the course of normal appellate review if he is convicted.

For the Court,

/s/ James T. Harper
Deputy Clerk of the Court

cc: The Judge Advocate General of the Navy
Counsel for Appellant (EVERSOLE)
Counsel for Appellee

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(4)

Supreme Court, U.S.
FILED
AUG 4 - 2007
OFFICE OF THE CLERK

No. 07-1397

In the Supreme Court of the United States

WALTER S. STEVENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner, a military retiree assigned to the temporary disabled retired list, is subject to trial by court-martial.

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In the Supreme Court of the United States

No. 07-1397

WALTER S. STEVENSON, PETITIONER,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 66 M.J. 15. The opinion of the Navy-Marine Corps Court of Criminal Appeals (Pet. App. 15a-42a) is reported at 65 M.J. 639. The order of the military judge (Pet. App. 43a-48a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 14, 2008. The petition for a writ of certiorari was filed on May 9, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3), but jurisdiction does not lie under that provision.

STATEMENT

Following a general court-martial with officer and enlisted members, petitioner was convicted of rape, in

violation of Article 120 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 920. He was sentenced to three years of confinement and a dishonorable discharge. The convening authority approved the sentence. The Navy-Marine Corps Court of Criminal Appeals (N-MCCA) affirmed the findings and the term of confinement but mitigated the nature of the discharge from a dishonorable discharge to a bad conduct discharge. Pet. App. 2a, 42a. On discretionary review, the United States Court of Appeals for the Armed Forces (CAAF) set aside the decision of the N-MCCA and remanded the case for consideration of several factual issues. *Id.* at 1a-14a.

1. In 1987, petitioner enlisted in the Navy and in 1991, he extended his enlistment. In March 1994, petitioner's enlistment expired but he was retained on active duty for medical processing. Following the decision of a Physical Evaluation Board, petitioner was discharged from the Navy and transferred to the Temporary Disabled Retired List (TDRL). He was awarded a 30% disability rating, entitling him to approximately $600 per month in military retirement pay. Petitioner was then evaluated by the Veterans' Administration (VA), which determined that he was 100% disabled. As a result, petitioner waived his right to continue receiving military retirement pay in order to receive greater compensation from the VA. Pet. App. 43a-45a. That election, however, did not remove petitioner from the TDRL. *Id.* at 20a. Moreover, petitioner retained the option of renouncing the VA disability compensation and obtaining military disability retired pay at any time. *Id.* at 24a.

2. In November 1997, the Naval Criminal Investigative Service (NCIS) determined that petitioner was a possible suspect in a November 1992 rape of a military

dependent. Pet. App. 20a. The rape occurred in on-base military housing in Honolulu, Hawaii, where the victim resided and where petitioner was on active duty. *Id.* at 19a-20a, 43a. Petitioner became a suspect in the crime when an NCIS investigator found a report noting that petitioner had been caught peeping into the bedroom of a different woman in military housing. *Id.* at 20a. The NCIS agent then determined that petitioner has the same blood type of the perpetrator of the rape, whose DNA had been recovered as part of a rape kit. *Id.* at 19a-21a.

At the time of the investigation, petitioner was on the TDRL and was being treated for diabetes at the VA hospital in Memphis, Tennessee. Pet. App. 3a. As part of that treatment, hospital personnel regularly drew blood for medical purposes. *Ibid.* The NCIS asked hospital personnel to draw an additional quantity of petitioner's blood for DNA testing the next time he reported for routine blood work. *Id.* at 3a-4a, 21a. Hospital personnel complied, drawing a vial of blood in addition to that required for medical purposes without advising petitioner of the purpose of the additional draw. *Id.* at 4a, 21a. The NCIS had DNA testing performed on that blood, and the testing revealed that petitioner was likely the person who committed the rape. *Id.* at 21a.

Under Article 2(a)(4) of the UCMJ, 10 U.S.C. 802(a)(4), "[r]etired members of a regular component of the armed forces who are entitled to pay" are subject to the UCMJ and trial by court-martial. Accordingly, in December 1998, military authorities charged petitioner with a single specification alleging rape, in violation of Article 120 of the UCMJ. Pet. App. 2a, 21a.

3. Before trial, petitioner moved to dismiss the charge for lack of personal jurisdiction, arguing that he

is not subject to court martial. The military judge (MJ) denied the motion. Pet. App. 43a-48a. The MJ noted that Article 2(a)(4) of the UCMJ, 10 U.S.C. 802(a)(4), subjects "[r]etired members of a regular component of the armed forces who are entitled to pay" to court-martial jurisdiction, and he reasoned that petitioner was "entitled to pay" at the time he was apprehended and charged, because petitioner was "a servicemember on the TDRL" who was "still 'entitled' to receive pay" even though he had elected to accept VA disability benefits in lieu of military disability retirement pay. Pet. App. 46a-47a. The MJ explained that, under petitioner's theory, "an accused could escape jurisdiction with the mere filing of a VA form," "wait for the charges to blow over," "and then revert back to the more lucrative retirement pay." *Ibid.* Petitioner took an interlocutory appeal of the MJ's ruling, and both the N-MCCA and the CAAF denied review. *Id.* at 49a-51a.

4. At trial, the MJ suppressed the vial of blood drawn by VA medical personnel for DNA testing. Pet. App. 4a. The N-MCCA affirmed. See *United States* v. *Stevenson*, 52 M.J. 504 (N-M. Ct. Crim. App. 1999). It held that Military Rule of Evidence 312(f), which authorizes the introduction at trial of "[e]vidence * * * obtained from an examination or intrusion conducted for a valid medical purpose," is inapplicable to retired members of the armed forces on the TDRL. 52 M.J. at 509-510.

The CAAF reversed and remanded. See *United States* v. *Stevenson*, 53 M.J. 257 (C.A.A.F. 2000). It explained that Military Rule of Evidence 312(f) applies to persons on the TDRL, because the "TDRL is a 'temporary' assignment, not a permanent separation from active duty"; persons on the TDRL are "required * * *

to undergo periodic physical examinations" to determine if they are fit for duty; and "even if a member on the TDRL is finally determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances." *Id.* at 259-260. The CAAF then remanded for the MJ to consider whether the taking of the extra vial of blood was permissible under Military Rule of Evidence 312(f) and the Fourth Amendment. *Id.* at 260-261. Petitioner filed a petition for a writ of certiorari with this Court, and the Court denied the petition. See *Stevenson* v. *United States*, 532 U.S. 919 (2001).

In the meantime, NCIS agents obtained a warrant from a federal magistrate judge authorizing them to obtain an additional vial of petitioner's blood. The warrant was executed, and DNA analysis of that blood again revealed that petitioner is the likely perpetrator of the rape. Pet. App. 4a, 22a.

5. On remand, the MJ determined that the intrusion resulting from the extraction of the vial of blood for DNA testing was *de minimis* and that, since petitioner's blood was originally drawn for a valid medical purpose, Military Rule of Evidence 312(f) did not "limit the purposes to which the seized evidence may be put or used." Pet. App. 5a.

Petitioner was then tried by a general court-martial, convicted of rape, and sentenced to three years of imprisonment and a dishonorable discharge. Pet. App. 2a.

6. The N-MCCA affirmed the conviction. Pet. App. 15a-42a. As relevant here, it rejected petitioner's claim that the court-martial lacks jurisdiction over members of the TDRL, holding that persons on the TDRL are "entitled to pay" under Article 2(a)(4) of the UCMJ. *Id.* at 22a-25a. The court noted the Court of Military Ap-

peals (the predecessor to the CAAF) had previously held in *United States* v. *Bowie*, 34 C.M.R. 411, 411-412 (C.M.A. 1964), that a former active duty servicemember who was placed on the TDRL was subject to court-martial jurisdiction, and it held that the fact that petitioner had elected not to receive military disability pay did not warrant a different result. Pet. App. 23a-24a. As the court explained, "[a] plain reading of [Article 2(a)(4)] indicates the entitlement to receive retired pay, and not the actual receipt of that pay, is the condition precedent to exercising court-martial jurisdiction over a retiree." *Id.* at 24a. The court also observed that petitioner "has the option of renouncing the VA disability compensation" and again receiving military disability pay. *Ibid.* And the court noted that, if petitioner's contention were accepted, "a person could avoid court-martial jurisdiction simply by renouncing military disability retired pay in favor of VA disability compensation," while "retaining the option to return to his or her military disability retired pay entitlement." *Id.* at 24a-25a.

The N-MCCA rejected petitioner's other claims of error, including his claim that drawing the first vial of blood without his consent violated the Fourth Amendment, but it modified petitioner's discharge from a dishonorable discharge to a bad conduct discharge as a remedy for excessive post-trial delay. Pet. App. 25a-42a.

The CAAF granted discretionary review with respect to only two questions: (1) "whether NCIS and VA hospital personnel violated the Fourth Amendment by seizing [petitioner's] blood and searching it for DNA evidence without probable cause or a search warrant issued on probable cause" and (2) "if this court suppresses the evidence from the warrantless search and seizure," whether "the lower court err[ed] by failing to address or

suppress blood and DNA evidence gained by a search warrant issued on tainted evidence and material misrepresentations." Pet. App. 2a-3a. Although petitioner sought review of the N-MCCA's jurisdictional holding, Supp. to Pet. for Grant of Review 13-18 (Nov. 20, 2006), the CAAF declined to grant review on that basis.

The CAAF then held, on the merits, that hospital personnel violated petitioner's Fourth Amendment rights in drawing the first vial of blood, and it remanded for the MJ to consider the admissibility of the second vial of blood, which was drawn after NCIS agents procured a search warrant. Pet. App. 6a-14a.

ARGUMENT

Petitioner contends (Pet. 9-17) that, as a disabled military retiree on the TDRL, he was not subject to the court-martial jurisdiction, because he was not "entitled to pay" under Article 2(a)(4) of the UCMJ and because subjecting him to court-martial jurisdiction would violate the Constitution. This Court lacks jurisdiction over those claims. Moreover, petitioner's claims arise in an interlocutory posture, and no court has ever passed on petitioner's constitutional claim. The decision below does not conflict with any decision of this Court or any other federal court of appeals, and, in any event, petitioner's claims lack merit. Further review is therefore unwarranted.

1. This Court's authority to review decisions of the CAAF is derived from 28 U.S.C. 1259. Petitioner asserts (Pet. 1) that this Court's jurisdiction rests on 28 U.S.C. 1259(3), which authorizes this Court to review "[c]ases in which the Court of Appeals for the Armed Forces granted a petition for review under section

867(a)(3) of title 10."[1] That authority, however, is expressly qualified by 10 U.S.C. 867a(a), which states: "The Supreme Court may not review by a writ of certiorari under this section any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." That limitation on review is applicable here. While the CAAF granted a petition for review on petitioner's claims that his Fourth Amendment rights were violated when NCIS investigators obtained samples of his blood, Pet. App. 2a-3a, it refused to grant review of his claim that the court martial lacked jurisdiction, Pet. 7.[2] Because the CAAF denied review of petitioner's jurisdictional claim, this Court does not have jurisdiction to review it on petition for writ of certiorari under the express terms of Section 867a(a). That limitation makes perfect sense, because although petitioner seeks to have this Court review the decision of the CAAF, that court has never reviewed petitioner's jurisdictional claims.

Moreover, the interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial" of the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see *VMI* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring); *Brotherhood of Loco-*

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[1] 10 U.S.C. 867(a)(3) states: "The Court of Appeals for the Armed Forces shall review the record in * * * all cases reviewed by a Court of Criminal Appeals in which, upon petition of the accused and on good cause shown, the Court of Appeals for the Armed Forces has granted a review."

[2] In an earlier appeal, the CAAF granted discretionary review of the question whether Military Rule of Evidence 312(f) is applicable to servicemembers on the TDRL, but it did not grant review of the separate question whether the UCMJ and the Constitution permit court-martial jurisdiction over members on the TDRL. See 53 M.J. at 257.

motive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam). This Court routinely denies petitions by criminal defendants challenging interlocutory determinations that may be reviewed at the conclusion of the criminal proceedings. See Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 281 n.63 (9th ed. 2007). That general practice, which enables the Court to examine any legal issues presented on a full trial record and prevents unnecessary trial delays, should be followed here. The court below remanded this case for a factual determination whether a search warrant whose execution resulted in obtaining crucial evidence in this case was predicated upon tainted information. Pet. App. 11a-12a. Resolution of that issue in petitioner's favor could result in the reversal of his conviction, thereby rendering the question presented by this petition moot. If petitioner does not prevail on the issue on remand, petitioner may then be able to present his contention to this Court in a petition for a writ of certiorari seeking review of a final judgement against him.[3] Accordingly, review by this Court would be premature at this juncture.

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[3] Petitioner correctly points out (Pet. 18) that this Court would only have jurisdiction on remand if the CAAF grants discretionary review of the question presented on remand. That fact does not counsel in favor of review in this case, however, because the CAAF *denied* review of the question presented. See pp. 6-7, *supra*. And even if the CAAF were to deny review later, petitioner may be able to present his jurisdictional claim to a federal court in an action for back pay, see, *e.g.*, *Augenblick* v. *United States*, 377 F.2d 586, 591-592 (Ct. Cl. 1967), rev'd on other grounds, 393 U.S. 348 (1969), or claim that he is entitled to collateral relief, even absent confinement, due to the continuing consequences of his punitive discharge, see *Kaufman* v. *Secretary of the Air Force*, 415 F.2d 991, 994-996 (D.C. Cir. 1969), cert. denied, 396 U.S. 1013 (1970).

Finally, this case would present a poor vehicle to consider the question presented because no court below has ruled on petitioner's constitutional claim. When considering petitioner's jurisdictional argument, both the MJ and the N-MCCA confined their analyses to the question whether petitioner is "entitled to pay" under Article 2(a)(4) of the UCMJ, see Pet. App. 22a-25a (N-MCCA), 46a-48a (MJ), and the CAAF declined to review any portion of the jurisdictional claim. No court passed on the question whether the exercise of court-martial jurisdiction over persons on the TDRL violates Article I, Section 8, Clause 14 of the Constitution. This Court ordinarily does not address issues that were not passed upon by the courts below. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999).

2. In any event, petitioner's claims lack merit.

a. First, the N-MCCA correctly rejected petitioner's claim (Pet. 15-17) that he was not a "[r]etired member[] of a regular component of the armed forces who [is] entitled to pay" under Article 2(a)(4) of the UCMJ, 10 U.S.C. 802(a)(4). As the N-MCCA explained, under the plain language of Article 2(a)(4), "the entitlement to receive retired pay, and not the actual receipt of that pay, is the condition precedent to exercising court-martial jurisdiction over a retiree." Pet. App. 24a.

That interpretation of the phrase "entitled to pay" comports with the ordinary meaning of those words. As this Court has explained, "Both in legal and general usage, the normal meaning of entitlement includes a right or benefit *for which a person qualifies*, and it does not depend upon whether the right has been acknowledged or adjudicated. It means only that the person satisfies the prerequisites attached to the right." *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992)

(emphasis added). Therefore, "the natural reading of the statute [employing the phrase "entitled to compensation"] supports the * * * conclusion that a person entitled to compensation need not be receiving compensation or have had an adjudication in his favor." *Ibid.* Moreover, to the extent there is any ambiguity in the phrase "entitled to pay" in the UCMJ, the military's interpretation of that phrase is entitled to substantial deference. See *Noyd* v. *Bond*, 395 U.S. 683, 694-696 (1969) (noting the need for "a substantial degree of civilian deference to military tribunals" due to the military courts' expertise in interpreting the UCMJ); *New* v. *Rumsfeld*, 350 F. Supp. 2d 80, 91 (D.D.C. 2004) (affording "substantial deference to the military courts in their application of military law"); see also *Schlesinger* v. *Councilman*, 420 U.S. 738, 756-760 (1975) (Court of Military Appeals (now the CAAF) has the primary responsibility for addressing matters relating to the administration of military justice).

There is no dispute that, as a member of the TDRL, petitioner "satisfies the prerequisites attached to the right" (*Cowart*, 505 U.S. at 477) to receive military disability retired pay. Moreover, as the N-MCCA observed in its decision (Pet. App. 24a-25a), petitioner's election to receive compensation from the VA and to waive his right to retired pay neither altered his temporary disability status as a member of the TDRL nor his right to receive military disability retired pay. The N-MCCA correctly reasoned that petitioner remained "entitled" to pay when he waived his military disability pay in lieu of VA benefits, because he retained the option of later

renouncing the VA benefits and again receiving military disability pay. Pet. App. 24a.[4]

The court observed that, under the governing regulations, a member of the TDRL who waives his or her military disability retirement pay in favor of VA disability compensation has the option of renouncing such compensation and returning to his or her prior entitlement to military disability retirement pay. Pet. App. 24a & n.9 (quoting 7B Dep't of Def. Fin. Mgmt. Reg., para. 120204 (Oct. 2000)). That is exactly what happened here. Although petitioner initially waived military disability pay in favor of VA benefits, when the VA discontinued his benefits after his court-martial, he invoked his entitlement to military disability pay and began receiving those benefits instead. Pet. 4 n.3. As the N-MCCA recognized, Congress surely could not have intended to permit a member of the TDRL to be able to exempt himself from court-martial jurisdiction at will by simply renouncing his entitlement to disability retired pay in favor of VA disability compensation while retaining the option to return to it at a later time. Pet. App. 24a-25a. Further review of petitioner's argument challenge to the the reach of the UCMJ is therefore unwarranted.

b. Petitioner is mistaken in contending (Pet. 9-14) that the exercise of court-martial jurisdiction over persons on the TDRL violates Article I, Section 8, Clause 14 of the Constitution, as supplemented by the Necessary and Proper Clause, Article I, Section 8, Clause 18. Like

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[4] Petitioner cites legislative history (Pet. 17) in an attempt to overcome the clear statutory text, but isolated statements in hearings cannot overcome clear statutory language. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148 (1994). As petitioner acknowledges (Pet. 17), since its original passage, the statute has required not that a retiree actually receive pay, but that he be *entitled* to receive pay.

other military retirees, petitioner is "part of the armed forces," *Toth* v. *Quarles*, 350 U.S. 11, 15 (1955), and he is therefore subject to trial by court-martial.

The Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14, and the Necessary and Proper Clause, U.S. Const. Art I, § 8, Cl. 18, supplements that provision. In the exercise of that authority. Congress has vested courts-martial with jurisdiction over "[r]etired members of a regular component of the armed forces who are entitled to pay." Art. 2(a)(4), U.C.M.J., 10 U.S.C. 802(a)(4). Although this Court has held that Congress cannot subject to court-martial jurisdiction civilian dependants, see *Reid* v. *Covert*, 354 U.S. 1, 19-23 (1957); *Kinsella* v. *Singleton*, 361 U.S. 234, 248 (1960), former members of the armed forces who have "severed all relationship with the military and its institutions," *Toth* v. *Quarles*, 350 U.S. at 14, 22-23, and civilian employees accompanying the armed forces overseas, see *McElroy* v. *Guagliardo*, 361 U.S. 281, 284-286 (1960); *Grisham* v. *Hagan*, 361 U.S. 278, 280 (1960), no similar prohibition limits the ability of Congress to subject military retirees to such jurisdiction.

Indeed, in *United States* v. *Tyler*, 105 U.S. 244, 245 (1881), this Court assumed that the exercise of court-martial jurisdiction over military retirees would be proper and specifically noted that "retired officers are in the military service of the government." This Court likewise recognized in *McCarty* v. *McCarty*, 453 U.S. 210, 221-222 (1981), that a "retired officer remains a member of the Army * * * and continues to be subject to the Uniform Code of Military Justice, see 10 U.S.C. § 802(4)." See also *Closson* v. *United States ex rel.*

Armes, 7 App. D.C. 460, 472 (App. D.C. 1896) ("It is very plain to us * * * that the appellee, as a retired officer of the army of the United States, was subject to arrest and detention by the military authorities to answer before a court-martial on the charges preferred against him."); William Winthrop, *Military Law and Precedents* 87 n.27 (1920 reprint) (noting that "retired officers are a part of the army and so triable by court-martial [is] a fact, indeed, never admitting of question" and collecting cases).

A military retiree continues to receive military pay, albeit at a reduced rate, not merely as a pension but as compensation for his continuing availability for recall to duty. See *Tyler*, 105 U.S. at 245. The former Court of Military Appeals (now the CAAF) made just this point in *United States* v. *Hooper*, 26 C.M.R. 417 (C.M.A. 1958), where it held that military retirees are subject to court-martial jurisdiction as part of "the land and naval Forces," U.S. Const. Art. I, § 8, Cl. 14. The court explained:

> Officers on the retired list are not mere pensioners in any sense of the word. They form a vital segment of our national defense for their experience and mature judgment are relied upon heavily in times of emergency. The salaries they receive are not solely recompense for past services, but a means devised by Congress to assure their availability and preparedness in future contingencies. This preparedness depends as much upon their continued responsiveness to discipline as upon their continued state of physical health.

Hooper, 26 C.M.R. at 425; see also, *e.g.*, *Pearson* v. *Bloss*, 28 M.J. 376, 380 (C.M.A. 1989); *Hooper* v. *United*

States, 326 F.2d 982, 987 (Ct. Cl.), cert. denied, 377 U.S. 977 (1964); *Tyler* v. *United States*, 16 Ct. Cl. 223, 235-236 (Ct. Cl. 1880).

Petitioner maintains (Pet. 11-14) that such a justification is inapplicable to military retirees who, like himself, are not retired due to age or time in service but instead are retired for medical reasons and are therefore unlikely to be returned to active duty. That assumption is unwarranted, particularly with respect to persons on the TDRL, which is a list of those who are *temporarily* disabled. Indeed, in *United States* v. *Bowie*, 34 C.M.R. 411, 411-412 (C.M.A. 1964), the CAAF specifically rejected the argument that a retired servicemember on the TDRL is not subject to court-martial jurisdiction because it cannot reasonably be expected that he will be recalled to active duty.

In an earlier proceeding in this case, the CAAF explained the nature of the TDRL and further elaborated on the basis for its ruling in *Bowie*. See *United States* v. *Stevenson*, 53 M.J. at 258-260 (holding that Military Rule of Evidence 312(f) applies to persons on the TDRL). If a servicemember on active duty becomes disabled, and the Service Secretary determines that the disability "may be of a permanent nature" but the circumstances do not permit a final determination that the condition is, in fact, "permanent * * * and stable," the Secretary is required to place the member on the TDRL. 10 U.S.C. 1202. While on the TDRL, the member is required to submit to periodic physical examinations "to determine whether there has been a change in the disability for which he was temporarily retired." 10 U.S.C. 1210(a). In the event that a periodic examination leads to a determination that the member is "physically fit" to perform his or her duties, he or she may be re-

turned to active duty with his or her consent, retired if otherwise eligible for retirement, discharged, or transferred to the inactive reserves. 53 M.J. at 258.[5] After five years on the TDRL, if the Secretary determines that the person is still disabled and the disability is permanent, the person may be retired; if he is adjudged fit for duty, he "has the same options as when such a determination is the result of a periodic examination." 53 M.J. at 258-259.

The exercise of court-martial jurisdiction over members on the TDRL underscores the continuing military status of a member on the TDRL, even if the member is not then performing regular duties. Court-martial jurisdiction reflects the view that the TDRL is a "temporary" assignment, not a permanent separation from active duty. Congress expressly denominated status on the TDRL as "temporary" and specifically required members on the TDRL to undergo periodic physical examinations to determine whether each member is "physically fit to perform" military duties. 53 M.J. at 259 (internal quotation marks omitted). Persons on the TDRL, therefore, are members "of the land and naval Forces." U.S. Const. Art. I, § 8, Cl. 14.

There is also no statutory basis for petitioner's unwarranted assumption (Pet. 14) that, in contrast to regular retirees, disabled retirees do not receive military retired pay as a retainer for future service but as a consequence of their inability to perform future service. Neither 10 U.S.C. 1201 or 1202 lends any support to that assertion. Indeed, insofar as 10 U.S.C. 1208 contem-

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[5] In the event that the member does not consent to a proposed return to active duty, "his status on the temporary disability retired list and his disability retired pay shall be terminated as soon as practicable and the member shall be discharged." 10 U.S.C. 1211(c).

plates that members on the TDRL may return to active duty in the event of improvement in their physical condition, it can be inferred that the purpose of their compensation, pending such improvement, is to maintain them at a reduced rate pending a final disposition of their suitability for further military duty. And it is of no consequence for the purpose of determining petitioner's continuing military status and amenability to court-martial jurisdiction that, at the time of the court-martial proceedings, he was receiving benefits and compensation from the VA rather than military retired pay, because he remained subject to physical examination and other requirements and eligible to receive military pay. See pp. 10-12, *supra*.[6]

Petitioner observes (Pet. 12-13) that, under current Department of Defense mobilization policy, disabled retirees are unlikely to be recalled to duty. As explained, however, membership on the TDRL connotes only a "temporary" disability that would disqualify the member from such duty. Moreover, as the CAAF has noted, "even if a member on the TDRL is finally determined to be unfit for duty and is retired for physical disability, the member retains military status and may be recalled to active duty under certain circumstances." *Stevenson*, 53 M.J. at 260. Petitioner concedes as much. Pet. 12.[7]

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[6] Petitioner contends (Pet. 11) that his placement on the permanent retired list in 1999 "terminated court-martial jurisdiction," but that is incorrect, because petitioner was on the TDRL in October 1998, when he was apprehended and charged, Pet. App. 47a, and because, in any event, military retirees are part of the armed forces. See pp. 12-13, *supra*.

[7] Contrary to petitioner's argument (Pet. 13), his military status is fundamentally different from that of a reservist who is awaiting recall

3. Petitioner suggests (Pet. 2) that review is warranted because of the burgeoning number of wounded and disabled members of the armed forces retired for disability as a consequence of the armed conflicts in Iraq and Afghanistan. In the first place, this case does not implicate the court-martial status of all disabled military retirees but only those who, like petitioner, are on the TDRL. Indeed, the N-MCCA specifically limited its analysis to persons on the TDRL. See Pet. App. 22a-25a. Moreover, the question presented by this case—whether members of the armed forces on the TDRL are properly subject to court-martial jurisdiction—rarely arises in the reported decisions of the military appellate courts, and petitioner has presented no evidence suggesting that the trial of military retirees within that category occurs with any frequency. Further review of petitioner's claims is therefore unwarranted.

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to active duty, a high school student who signs an enlistment contract under a delayed entry program but has not yet actually enlisted, or person drafted into the armed forces prior to induction. In the first place, in contrast to persons on the TDRL, none of these categories of individuals are entitled to receive pay from the armed forces even though not performing military duties. Moreover, while persons in these categories possess only a possible future affiliation with the armed forces, persons on the TDRL possess a continuing military status even if they are not performing regular military duties. See *Stevenson*, 53 M.J. at 259.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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WALTER S. STEVENSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

REPLY TO BRIEF IN OPPOSITION

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REPLY BRIEF FOR PETITIONER

The petition in this case presents a significant constitutional question of first impression—that is, whether a disabled military retiree, who has few if any connections with the military and does not receive military retired pay, is part of the "land and naval Forces" and subject to court-martial jurisdiction. Respondent does not address this fundamental question but instead sidesteps the issue by raising several unpersuasive procedural arguments. Respondent further confuses the issue by misconstruing the relationship between disabled retirees and the military, as well as the precedent governing their relationship. These arguments should not dissuade the Court from granting the petition and ensuring that more than 93,000 disabled retirees are provided the safeguards associated with an Article III court.

I. THE COURT HAS JURISDICTION OVER THE CASE AND IT IS RIPE FOR REVIEW.

1. Respondent's argument regarding the Court's jurisdiction is unsupported by the plain language of 28 U.S.C. § 1259(3). As respondent concedes (Opp. Br. 7-8), section 1259(3) plainly allows the Court to review "*cases* in which the Court of Appeals for the Armed Forces granted a petition for review." (emphasis added). When the CAAF granted review of petitioner's "case" on May 30, 2007, that grant should have been sufficient for the Court's review.

Respondent neither contests the plain language of section 1259(3), nor challenges the plain meaning of "case." Rather, it argues (Opp. Br. 8) that Article 67a(a), Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 867a(a), confines the Court's authority to reviewing only "claims" granted by the CAAF. This assertion is not supported by the plain language

of Article 67a(a), which prohibits the Court from reviewing "any action of the Court of Appeals for the Armed Forces in refusing to grant a petition for review." In other words, the Court does not have the authority to review the CAAF's decision to deny a petition for review. However, Article 67a(a) does not prevent the Court from reviewing cases, like this one, where the CAAF has granted review. Those cases are clearly reviewable under section 1259(3).

While the Court need not look past the plain language of these statutes, *see Bread PAC v. Fed. Election Comm'n*, 455 U.S. 577, 580-81 (1982), the legislative history of section 1259(3) also supports a finding of jurisdiction. This history "makes it clear that the Supreme Court has jurisdiction over any case in which the lower court granted review, even if the grant did not include the particular issue on which the certiorari petition is predicated." Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, *in* EVOLVING MILITARY JUSTICE 150-51 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002). When Congress originally considered the possibility of direct review by the Court, the language limited such jurisdiction to "issues upon which the Court of Military Appeals granted review." *Id.* (citing H.R. 6298, 96th Cong. § 4(a) (1980), *reprinted in Hearings on H.R. 6406 and 6298: Revisions of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process before the Military Personnel Subcomm. of the H. Comm. on Armed Services*, 96th Cong. 39 (1980)). The House of Representatives later rejected the "issue" language and passed a bill allowing the Court to review "cases in which the Court of Military Appeals granted a petition for review." *Id.* (citing H.R. 8188, 96th Cong. § 4(a) (1980)). This broader language ultimately was adopted in 28 U.S.C. § 1259. It clearly shows Congress's intent to allow the Court's

review of "cases"—not "issues"—where the CAAF has granted a petition for review.

2. Respondent mistakenly challenges the ripeness of this case. In so doing, respondent does not and cannot question the Court's authority to review an interlocutory appeal under 28 U.S.C. § 1259. *See Solorio v. United States*, 483 U.S. 435 (1987). Rather, it suggests (Opp. Br. 9-10) that the Court should deny this petition because the CAAF remanded a search warrant issue and has refused to address the constitutional issue in this case. Neither claim is persuasive.

The Court has long granted interlocutory cases, like this one, where the issue on certiorari is "independent of, and unaffected by" the issue being reviewed on remand. *See Brady v. Maryland*, 373 U.S. 83, 84 n.1 (1963) (citations omitted). Respondent does not contest this point, but argues (Opp. Br. 9) that the lower court's decision on the search warrant may moot petitioner's jurisdictional claim. That is not accurate. Regardless of the lower court's decision, without action by the Court, petitioner will be subject to court-martial jurisdiction and the harm caused by that jurisdiction, including a possible retrial. This issue is far from moot.

Moreover, without immediate action by the Court, petitioner may lose the opportunity to raise his jurisdictional issue in a future proceeding on direct review.[1] In similar

[1] Respondent concedes (Opp. Br. 9 n.3) this point, but argues that the jurisdictional claim can be addressed in a collateral proceeding before the Court of Federal Claims. While true, this assertion ignores several key distinctions between direct review and collateral review. In particular, collateral cases are subject to a more stringent standard of review, *see Moore v. United States*, 61 Fed. Cl. 146, 150 (Fed. Cl. 2004) ("this court's review of military proceedings must be extremely deferential."), and petitioner will be denied certain constitutional rights, like the right to counsel. *See Pennsylvania v. Finley*, 481 U.S. 551 (1987).

cases, the Court has been willing to review interlocutory appeals to protect a petitioner's right to review. *See Florida v. Meyers*, 466 U.S. 380, 381 n.* (1984) (granting a case where the State could lose its right to challenge an issue in a future proceeding); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975) (citing *California v. Stewart*, 384 U.S. 436 (1966)). The Court should do the same here.

Finally, respondent makes the unpersuasive argument (Opp. Br. 10) that the petition should be denied because military courts have refused to address the issue. This argument claims as a virtue what actually is a vice. Petitioner has raised the constitutional claim regarding court-martial jurisdiction on five occasions[2] and, on each occasion, military courts have refused to mention or address the issue. By continuing its exercise of court-martial jurisdiction, notwithstanding petitioner's numerous legal challenges, the lower courts have implicitly rejected the arguments raised in this petition. Surely lower courts cannot insulate their decisions from the Court's review by proceeding implicitly rather than ruling directly.[3]

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[2] Petitioner raised the issue in a pre-trial motion to the court-martial judge, on interlocutory appeals to the Navy-Marine Corps Court of Criminal Appeals (NMCCA) and the CAAF, and on direct appeal to the NMCCA and the CAAF.

[3] Respondent cites *NCAA v. Smith*, 525 U.S. 459, 470 (1999), for the proposition that the Court "ordinarily does not address issues that were passed upon by the courts below." This case is cited out of context. In *Smith*, the Court granted review of the case, reversed the lower court's decision and, as part of a remand order, decided not to address questions that would be litigated on remand. This case does not allow a lower court to evade the Court's review by simply ignoring the issue.

II. DISABLED MILITARY RETIREES ARE NOT PART OF THE "LAND AND NAVAL FORCES."

1. As emphasized in the petition (Pet. 9-10), court-martial jurisdiction is limited to persons who "can be regarded as falling within the term 'land and naval Forces.'" *Kinsella v. United States*, 361 U.S. 234, 240-41 (1960) (quoting U.S. Const. art. I, § 8, cl. 14). In the context of military retirees, the linchpin of such jurisdiction has been the retiree's receipt of military retired pay, which is not only compensation "for past services, but a means devised by Congress to assure his availability and preparedness in future contingencies." *Hooper v. United States*, 326 F.2d 982 (Ct. Cl. 1964) (citations omitted). The retired pay provides the retiree with a "direct connection" to the military. *Id.*

Respondent's brief entirely skips this fundamental issue, but instead cites several cases that support a proposition not being challenged here—that is, if a military retiree receives retired pay, then that retiree is subject to court-martial jurisdiction. *See United States v. Tyler*, 105 U.S. 244 (1881); *McCarthy v. McCarthy*, 453 U.S. 210 (1981); *Closson v. United States*, 7 App. D.C. 460 (App. D.C. 1896); *United States v. Hooper*, 26 C.M.R. 417 (C.M.A. 1958). Petitioner does not dispute this holding. However, these cases do not support the respondent's position that a disabled retiree, who does not receive retired pay, is subject to court-martial jurisdiction. There is no legal support for such an argument.

Respondent's brief also fails to recognize historical differences between the treatment of retired officers and retired enlisted personnel. For example, while respondent cites several cases finding jurisdiction over retired officers, *see, e.g.*, *Tyler*, 105 U.S. 244, and *Closson*, 7 App. D.C. 460, these cases do not apply to enlisted personnel. On the contrary, the Court of Claims found that the holding in *Tyler*

was inapplicable to enlisted members because such members had lesser statutory obligations upon their retirement. As the court noted, enlisted members were not "subject to military duty, even at the command of the President. If not subject to military duty, then in what way and for what purpose can it be said that enlisted men on the retired list are part of the Army?" *Murphy v. United States*, 39 Ct. Cl. 178, 180 (Ct. Cl. 1904). In this context, *Tyler* and its progeny are not applicable here.

Ultimately, respondent has failed to provide a reasoned basis for depriving petitioner and 93,000 other disabled retirees of their right to the constitutional safeguards provided by an Article III. These disabled veterans have served their country. They should not be subject to a lifetime of court-martial jurisdiction simply because they were disabled during their service and because they receive compensation from the VA to offset their reduced ability to work. The petition in this case provides more than sufficient cause for a grant of review.

2. Respondent likewise errs by attempting to narrow the harm caused by the lower court's decision.[4] Contrary to these assertions, the constitutional question in this case—whether a disabled retiree who does not receive pay from the military can be subject to court-martial jurisdiction—impacts military retirees on both the temporary disabled retired list (TDRL) and the permanent disabled retired list (PDRL). As noted above, the linchpin of this jurisdictional question is whether the disabled retiree is receiving retired pay. Without

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[4] Respondent wrongly asserts (Opp. Br. I, 7, 11-17) throughout its brief, as well as its version of the question presented, that petitioner is included on TDRL. These assertions are factually inaccurate. As noted in the petition and this reply, respondent was transferred to the PDRL in July 1999 and continues to be assigned to that list.

such pay, as is the case here, then the retiree is not part of the "land and naval Forces." This jurisdictional question is not affected by the retiree's placement on the TDRL or PDRL.

3. Respondent misconstrues the relationship between members on the TDRL and the armed forces. In particular, respondent wrongly asserts (Opp. Br. 15-17) that members on the TDRL are temporarily retired and are expected to return to active duty, if and when their disability subsides. Based on this faulty premise, respondent next argues (Opp. Br. 17) that "the purpose of their [military] compensation . . . is to maintain them at a reduced rate pending a final disposition of their suitability for further military duty." Both arguments lack merit.

Respondent's brief ignores one significant factor: namely, members on the TDRL cannot be involuntarily recalled to active duty, but have to consent to such service. *See* 10 U.S.C. § 1211. In other words, even if their disability subsides, members on the TDRL have no further obligation for military service and, thus, the military cannot reasonably rely on their return. On the contrary, their service is terminated when they are placed on the TDRL. *See Craft v. United States*, 210 Ct. Cl. 170, 185 (Ct. Cl. 1976) ("[w]hen on the temporary retired disability list, a serviceman is actually separated from the military.").

Nor can it be said that disabled retirees receive retired pay as a retainer for future service. Such a claim is not accurate. Disabled retirees receive retired pay to compensate them for their injuries. That is why they are not allowed to receive both military retired pay and disability compensation from the Department of Veterans Affairs (VA). *See* 38 U.S.C. § 5305. It also explains why they are not subject to involuntary recall to active duty.

III. ARTICLE 2(A)(4), UCMJ, DOES NOT ALLOW COURT-MARTIAL JURISDICTION OVER DISABLED RETIREES WHO HAVE WAIVED THEIR RIGHT TO RECEIVE MILITARY RETIRED PAY.

Respondent incorrectly claims (Opp. Br. 10-12) that the plain language of Article 2(a)(4), UCMJ, permits jurisdiction over disabled retirees. Not only does this argument ignore well-established rules of statutory construction, it fails to recognize the impact of petitioner's waiver of his entitlement to military retired pay. These arguments must fail here.

First, respondent ignores the well-established canon of statutory construction that requires courts to avoid treating statutory terms as unnecessary surplusage. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (citing *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Ore.*, 515 U.S. 687, 698 (1995); *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)). By interpreting Article 2(a)(4) so that all retirees are subject to jurisdiction, respondent has made the "entitled to pay" language mere surplusage. Had Congress intended such a result, it could have simply provided for jurisdiction over "[r]etired members of a regular component of the armed forces." By adding the "entitled to pay" language, Congress clearly intended to limit the scope of this article. Accordingly, this language must be given effect by recognizing that there are certain retirees, like petitioner, who are not entitled to retired pay and not subject to jurisdiction.

Second, respondent completely ignores the waiver in this case and its impact on petitioner's entitlement. Contrary to respondent's suggestion, a servicemember's entitlement to pay is not some inviolable right that can never be extinguished. That is not true. In fact, in the case cited by

respondent, *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475-77 (1992), this Court found that while a person may be entitled to certain statutory benefits, those benefits could be forfeited or waived by not complying with the statute. This case is no different. Petitioner waived his right to military retired pay by completing the waiver pursuant to 38 U.S.C. § 5305. That waiver effectively terminated his entitlement to pay, which terminated the military's right to exercise court-martial jurisdiction.

CONCLUSION

For the reasons stated above, and those set forth in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted,

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IN THE

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WALTER S. STEVENSON, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

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BRIEF OF NATIONAL INSTITUTE OF MILITARY JUSTICE AND NATIONAL VETERANS LEGAL SERVICES PROGRAM AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The National Institute of Military Justice ("NIMJ") is a District of Columbia not-for-profit corporation founded in 1991 to advance the fair administration of justice in the armed forces and to foster improved public understanding of the military justice system. NIMJ, which is affiliated with the Washington College of Law, American University, regularly appears as an amicus curiae in cases raising important issues of military law and policy. NIMJ's directors and advisors include law deans and professors and private practitioners, most of whom have served as military lawyers, up to and including flag and general officer rank.

The National Veterans Legal Services Program ("NVLSP") is an independent, nonpartisan, nonprofit advocacy, educational, and policy organization founded in 1980. It is dedicated to ensuring that veterans and their families receive the VA benefits

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the amici curiae's intention to file this brief. No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

and assistance they need and deserve. NVLSP is a veterans service organization recognized by the VA and regularly represents veterans before VA regional offices, the Board of Veterans Appeals, and the Court of Appeals for Veterans Cases, and appears as an amicus curiae in other forums on important issues of veterans law.

SUMMARY OF ARGUMENT

Military justice is an exceptional jurisdiction which, because it does not provide the full panoply of rights conferred by the Constitution, should be no broader than necessary to achieve good order and discipline in the armed forces. It offends the Constitution to court-martial a retiree who is on the Permanent Disability Retired List ("PDRL").

ARGUMENT

In personam jurisdiction is the threshold, and in a democratic society, the *central* issue in the administration of justice through military courts. NIMJ and NVLSP believe the decision of the Court of Appeals reflects a misreading of the Uniform Code of Military Justice ("UCMJ") and runs counter to this Court's jurisprudence over the last half-century. It is also contrary to prevailing international human rights norms.

Beginning with *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), the Court has made clear that court-martial jurisdiction comes at the expense of important constitutional rights (such as trial by jury) and must therefore be confined to the least possible scope necessary to the end proposed. *Id.* at 22. The result is a series of decisions holding unconstitutional various provisions of the UCMJ

that purport to extend court-martial jurisdictions to persons who are not, and in some instances never have been, on active duty. *Reid v. Covert*, 354 U.S. 1 (1954); *Kinsella v. Singleton*, 361 U.S. 234 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *McElroy v. Guagliardo*, 361 U.S. 281 (1960).

This case involves the UCMJ provision that brings within the sweep of the court-martial system retired regulars who are entitled to pay. UCMJ art. 2(a)(4), 10 U.S.C. § 802(a)(4). Whether or not that rarely-used provision is constitutional in the case of personnel who are retired by reason of longevity, it cannot plausibly be defended in the case of those who, like petitioner, are retired for physical disability and placed on the PDRL.

The petition ably marshals the arguments against court-martial jurisdiction. We believe they are unanswerable given the exacting test the Court has correctly applied in the past when considering the constitutionality of congressional efforts to subject various categories of individuals other than active duty military personnel to court-martial jurisdiction.

1. The petition is properly filed despite the fact that the Court of Appeals did not grant review of the Question Presented. That court's jurisdiction over this case was discretionary. UCMJ art. 67(a)(3), 10 U.S.C. § 867(a)(3). Although it granted petitioner's petition for grant of review, it did so only with respect to two other issues. Pet. App. 2a-3a. The Solicitor General has in the past taken the position that review by petition for a writ of certiorari is available only with respect to issues as to which the Court of Appeals has granted review. That position is plainly wrong. When Congress expanded the cer-

tiorari jurisdiction to include cases arising under the UCMJ, it did so with respect to "cases" in which the then Court of Military Appeals had granted review, abandoning the approach taken earlier in the legislative process of permitting review only of "issues" as to which that court had granted review. *See generally* Eugene R. Fidell, *Review of Decisions of the United States Court of Appeals for the Armed Forces by the Supreme Court of the United States*, in EVOLVING MILITARY JUSTICE 150-51 & nn.12-15 (Eugene R. Fidell & Dwight H. Sullivan eds. 2002). This is an "unresolved question."[2] Even if, contrary to our submission, the Court denies the petition in light of the considerations set forth in Rule 10, we respectfully suggest that it is important for the Court's order to make clear that a petition for a writ of certiorari will lie as to any issue in a case in which the Court of Appeals has granted review, regardless of whether that court's grant includes the issue with respect to which certiorari is sought. It is disturbing enough that Congress has given the service-members who defend our Nation narrower access to this Court than the untrammeled access enjoyed by other petitioners for certiorari;[3] there is no reason to make that discrepancy worse by construing the grant of certiorari jurisdiction in court-martial cases more narrowly than the statutory text or legislative history warrant.

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[2] EUGENE GRESSMAN, KENNETH S. GELLER, STEPHEN M. SHAPIRO, TIMOTHY S. BISHOP & EDWARD A. HARTNETT, SUPREME COURT PRACTICE 128 n.103 (9th ed. 2007).

[3] *Id.* at 130; *compare* 28 U.S.C. § 1254 *with* 28 U.S.C. § 1259; *see also* UCMJ art. 67a(a), 10 U.S.C. § 867a(a).

2. Petitioner is correct in suggesting (at 18) that the Court should not delay consideration of the important jurisdictional issue as to which he seeks certiorari. A similar question arose in *Solorio v. United States*, 483 U.S. 435 (1987), which concerned subject-matter, rather than personal jurisdiction, but the interest in resolution is the same. The Court granted review there even though the case was pending on interlocutory appeal. Given the number of PDRL retirees whose amenability to trial by court-martial would turn on a decision in this case, an authoritative determination by this Court would serve the public interest.

3. Permitting court-martial jurisdiction over PDRL retirees runs counter to the line of authority under which such retirees are outside the sweep of *Feres v. United States,* 340 U.S. 135 (1950). *McGowan v. Scoggins*, 890 F.2d 128, 137-39 (9th Cir. 1989); *Crumpler v. United States*, 495 F. Supp. 266 (S.D.N.Y. 1980). The reason, of course, is that they are as a practical matter civilians. They have no military duties and their involuntary recall to active duty is so deeply improbable as to be nonexistent. *See* Pet. at 12-13 & nn.11-12.[4] Allowing them to sue the government creates none of the tension and distraction that has been cited in connection with intra-military litigation. *See also Chappell v. Wallace*, 462

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[4] While retirees have on occasion been recalled to active duty, *see* 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, COURT-MARTIAL PROCEDURE § 2-20.00, at 2-28 (3d ed. 2006), we are unaware of any involuntary recall of a lisabled retiree. Voluntary recalls are not probative with respect to the constitutionality of subjecting to military justice persons who have not agreed to be recalled.

U.S. 296 (1983). It exalts form over substance to view those who are on the PDRL as part of the military for the purpose of criminal jurisdiction.

4. The application of military justice to retired personnel is also contrary to prevailing international human rights norms. For example, in *Case of Palamara-Iribarne v. Chile*, Judgment of Nov. 22, 2005, Ser. C, No. 135, http://www.corteidh.or.cr/docs/casos/articulos/seriec_135_ing.doc,[5] the Inter-American Court of Human Rights, held that a retired officer who was employed by the Chilean Navy in a civilian capacity was not subject to trial by court-martial. The court found a violation of, among other things, Article 8(1) of the American Convention on Human Rights, O.A.S. Treaty Ser. No. 36, 1144 U.N.T.S. 123, *entered into force* July 18, 1978, commenting:

> 139. The Court has pointed out that the application of military justice must be strictly reserved to active-duty military members, based on a previous case wherein it noted that "when [the] proceedings [against the victim] were started and heard, [he was] a retired military member, and therefore, could not be trie[d] by the military courts." [*Cf. Case of Cesti-Hurtado v. Peru*, Judgment of Sept. 29, 1999, Ser. C, No. 56 (¶ 151).] Chile, as a democratic State, must respect the restrictive and

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[5] We are grateful to Agustina Del Campo, Impact Litigation Project Coordinator, Washington College of Law, for this reference.

> exceptional scope of military courts, and exclude the trial of civilians from the jurisdiction thereof.
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> 141. The Court considers that Chile has not adopted the necessary measures for Mr. Palamara-Iribarne to be tried by ordinary courts, since as a civilian her did not have the military status required to be deemed the perpetrator of a military criminal offense. The Court notes that, in Chile, establishing that a person has military status is a complex task which requires the interpretation of various provisions and regulations, which allowed the judicial authorities who applied them to make a broad interpretation of the concept of "military" in order to subject Mr. Palamara-Iribarne to the military Courts.
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> 142. Such broad jurisdiction of military courts in Chile, which allows them to hear cases which should be heard by civilian courts, is not in line with Article 8(1) of the American Convention.

The court ordered Chile to "align its domestic legal system to the international standards regarding criminal military jurisdiction within a reasonable period of time, so that in case it considers the existence of a military criminal jurisdiction to be necessary, this must be restricted only to crimes committed by military personnel in active service." P. 101 (¶ 14). Consistent with this analysis, the draft UN Principles Governing the Administration of Justice Through Military Tribunals, E/CN.4/2006/58 (Jan.

13, 2006), observe that "[m]ilitary courts should, in principle, have no jurisdiction to try civilians. In all circumstances, the State shall ensure that civilians accused of a criminal offence of any nature at tried by civilian courts." *Id.* at 10 (Principle No. 5); *see also id.* at 11 (¶ 21) (jurisprudence of European Court of Human Rights, Inter-American Court, Inter-American Commission on Human Rights and African Commission on Human and Peoples' Rights is unanimous with respect to military courts' lack of jurisdiction to try civilians). While there may be circumstances in which a non-military person such as a dependent or a civilian accompanying the forces in the field might well prefer trial by court-martial over a foreign alternative forum, *see* Michael R. Gibson, *International Human Rights Law and the Administration of Justice Through Military Tribunals: Preserving Utility While Precluding Impunity*, 4 J. INT'L L. & INT'L REL. 1, 24-26 (2008), it is difficult to extend that approach to disabled retirees for whom the alternative is trial in a civilian American court of law. This Court's longstanding skepticism with respect to the trial of civilians by court-martial is consistent with international norms and warrants a narrow interpretation of UCMJ art. 2(a)(4).

CONCLUSION

For the foregoing reasons and those stated by petitioner, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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